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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

## No. 589.

EASTERLING LUMBER COMPANY, O. L. BENWAY, AND T. R. THAMES, PLAINTIFFS IN ERROR,

vs.

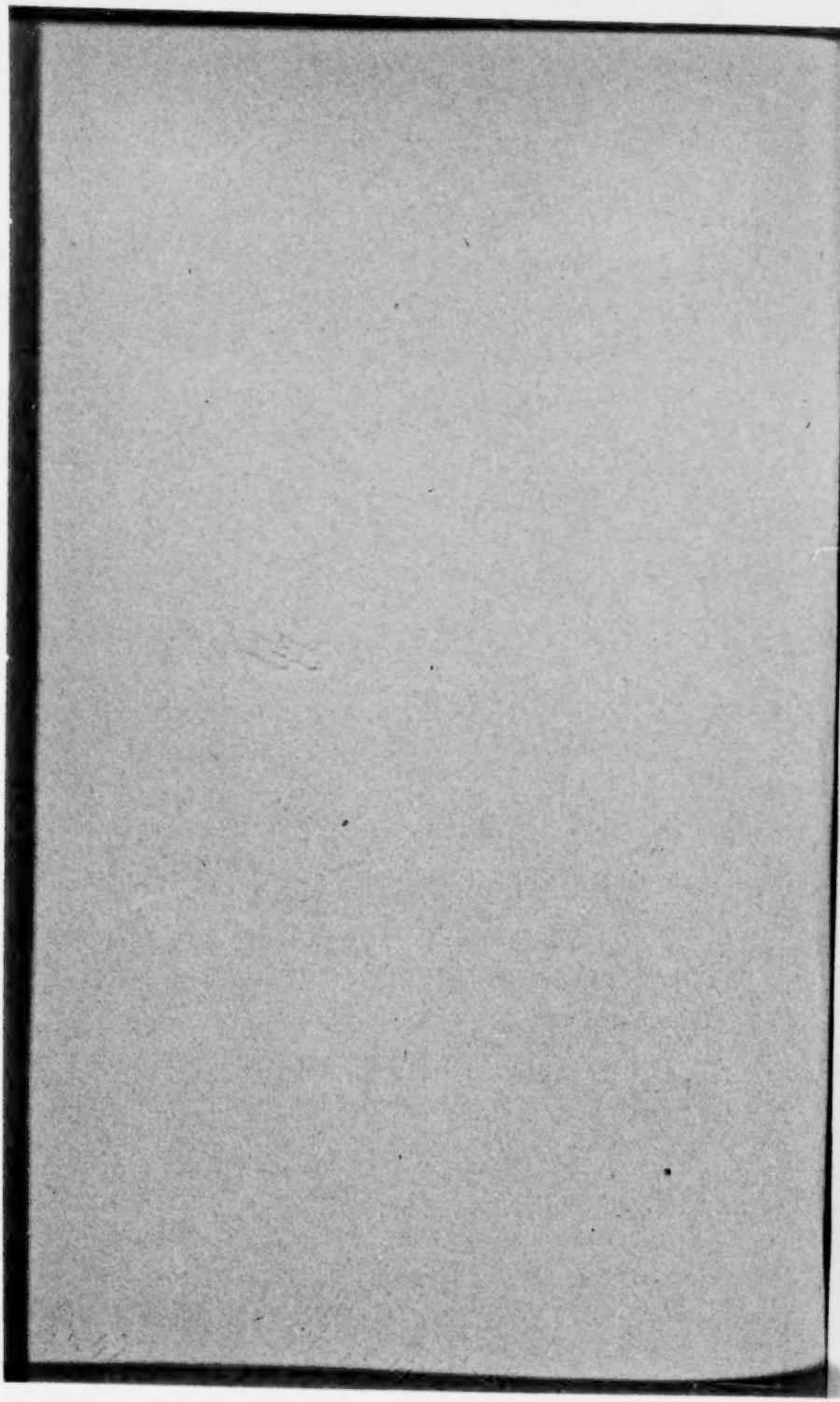
S. W. PIERCE.

MINNESOTA STATE LIBRARY

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED AUGUST 7, 1914.

(24,333)



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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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1 In the Supreme Court of Mississippi, March Term, A. D. 1914.

MONDAY, March 2nd, 1914.

Pleas and Proceedings Had and Done at a Regular Term of the Supreme Court of Mississippi, Begun and Held at the Court Room, in the City of Jackson, on the First Monday of March, A. D. 1914.

Present: The Honorable Sydney Smith, Chief Justice; the Honorable Sam C. Cook, and the Honorable Richard F. Reed, Associate Justices; Geo. C. Myers, Clerk, and C. L. Johnson, Marshal.

The following proceedings were had in the case of—

16274.

EASTERLING LUMBER COMPANY et al.
vs.
S. W. PIERCE.

2 #16274.

Volume One.

EASTERLING LUMBER COMPANY et al., Appellants,
vs.
S. W. PIERCE, Appellee.

An Appeal from the Circuit Court of Covington County, Mis.

T. Brady Jr. of Brookhaven, Miss. and Mayes and Mayes of Jackson, Miss. attorneys for Appellants.
E. L. Dent of Collins, Miss. and Hirsh, Dent and Landau, Vicksburg, Miss. attorneys for appellee.

3 Volume One.

S. W. PIERCE
vs.
EASTERLING LUMBER COMPANY et al.

Appealed from Circuit Court of Covington County, Mississippi.

Judgment for Appellee, $17,500.00.
Court cost, $104.40.

4 STATE OF MISSISSIPPI,
*Covington County:*

Circuit Court.

No. 482.

S. W. PIERCE
vs.
EASTERLING LUMBER COMPANY et al.

Be it remembered that there was begun and held at the Court House in the County of Covington, a regular July term, A. D. 1912 of the Circuit Court of said County and State, with the Hon. W. H. Hughes, Circuit Judge presiding, Dan Williamson Circuit Clerk, and Lawrence Warren, Sheriff; that among other things had and done at said term of said court, the above entitled suit was tried and the following proceedings were had therein to-wit:

5 STATE OF MISSISSIPPI,
*Covington County:*

In the Circuit Court, to January Term, 1911.

S. W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendants.

S. W. Pierce by its attorneys complain- of the Easterling Lumber Company, a corporation domiciled and doing business at Ora, in Covington County, and State of Mississippi, Will Tatum and John Tatum, residents and citizens of Ora in Covington County and State of Mississippi and for Cause of action alleges as follows, to-wit:

For that whereas, heretofore, to-wit: on or about the 16th day of October, A. D., 1911, the said defendant, the Easterling Lumber Company, owned and operated a saw mill in the town of Ora, and it owned and operated in connection therewith a railroad line, log road or dummy line for the purpose of hauling logs and lumber to and from said mill and on and over said line of railroad it runs, and on said day did run engines and trains of cars propelled by the agency of steam.

That on said date and prior thereto, the said defendant, Will Tatum, was an employee of said defendant, the Easterling Lumber Company, and was the vice-principal, for-man and duly authorized representative and agent of the said defendant the Easterling Lumber Company. He had full charge and control of the said railroad, logging road or dummy line owned and operated, as aforesaid, and for the purpose aforesaid, and he had full power and authority to direct and did direct the movements and running of any and all engines, trains and cars, on and over said railroad, log road or dummy line and he had full power and authority to direct
6 the services of this plaintiff, who, at said time, was an employee of the said defendant, the Easterling Lumber Com-

pany. That said Will Tatum had full control, supervision of, and over any and all employees connected with or operating said line of railroad, as aforesaid. He had authority to employ and discharge any and all employees operating said line, and it was his duty to employ competent and efficient men to run all engines and trains on and over said line.

That on said date aforesaid, said defendant, John Tatum, was an employe of the said defendant, Easterling Lumber Company, and was engaged as a fireman on one of its engines commonly known and called the "Shay Engine" which was run and operated on and over said line and on the morning of said date, a short time before the injury and negligence hereinafter complained of, it was several miles out on said line at *which* was commonly known and called the logging camps of the said defendant, the Easterling Lumber Company.

Plaintiff avers, that on said date, as aforesaid, he was an engineer, in charge of and running one of the engines of said defendant, the Easterling Lumber Company, on and over said railroad as aforesaid, by and under the supervision and direction of the said defendant, Will Tatum, who had full and complete control of said line, as aforesaid, and who directed the movement of all the engines and trains along and over said line, as aforesaid, as his the said Tatum's independent judgment and discretion dictated.

That on the morning of said date, aforesaid, plaintiff took charge of his engine and was ordered by said defendant Will Tatum, to run it on and over said line while pursuing his duties, as engineer, and while acting in obedience to the orders and directions of said Will Tatum, foreman, as aforesaid, plaintiff, with due care and diligence, undertook to run his engine and train of cars on and over said line in a westerly direction from said mill towards to the said logging camp or station as aforesaid, that in accordance with the rule and regulations by which said railroad was operated
7 plaintiff's engine and train had the right of way, paramount or superior right, on and over said line, over any and all other engines, trains and cars that were run or to be run on and over the same, and while his engine and train was running thereon from said mill to said logging camp no other engine or train had *nay* right to be thereon.

That not with standing the fact the plaintiff's engine and train had superior right on and over said line, while running thereon in obedience to said orders and in accordance with the rules and regulations aforesaid, when he had proceeded to run said engine and train some ten or twelve miles thereon towards said station, the said defendants negligently run, or caused to be negligently run on or over said line the said "Shay Engine" or train upon, over and against the engine, which was being properly operated by this plaintiff, and thereby caused a "head on" collision by and between his engine and the said "Shay Engine" which was being negligently run towards his engine, and out of time and with out any right to be on said line, by the said John Tatum, who was

not an engineer, but only a fireman, and who was not competent to run and manage an engine.

That plaintiff's engine had the right of way as aforesaid, and the said "Shay Engine", which collided with the plaintiff's engine, had no right to be run on or over said track at the time said collision occurred and this all of the defendants well knew.

That by reason of the fact that said defendants permitted said Shay Engine to negligently run upon, over and against said engine that was being run by plaintiff, he was greatly and permanently injured in both mind and body in the collision caused thereby.

That said collision between said engines was caused by the concurrent gross negligence, carelessness, mis-conduct and mismanagement of the said defendants, the Easterling Lumber Company, and the said John Tatum and Will Tatum.

8 Plaintiff says that the negligence of the said defendants proximately produced his injuries, and but for their gross negligence improper acts and conduct in permitting said "Shay Engine" to be run on and over the said line towards, upon and against his engine, at a time when it had no right to be run thereon, plaintiff would not have received his injuries.

Plaintiff alleges that the said defendant, the Easterling Lumber Company and the said Will Tatum were negligent in permitting said train to be run on and over said line when the engine and train that was being run by the plaintiff had the right of way, paramount or superior thereon to the said "Shay Engine, as aforesaid, and the said John Tatum was negligent in running or attempting to run said "Shay Engine" on and over said line at the time of said collision; that the said John Tatum was not competent to run said "Shay Engine", and had no right to run it on and over said line at said time and his inability and incompetency to run said engine was known to him and to the said defendant, the Easterling Lumber Company, and the said Will Tatum, foreman.

Plaintiff says that he was horribly and permanently crippled in said collision. His leg and ankle was crushed and broken; his body and all parts thereof bruised and made sore and he is horribly and permanently injured, and will suffer in body and mind as long as he lives.

Plaintiff therefore says that on account of said injuries he has suffered great pain of body and anguish of mind, and he has been put to great expense for medical and surgical attention, and that he has been ever since he received said injuries, incapacitated for work, and that his said injuries are permanent and his earning capacity has been practically destroyed by the negligent acts of the said defendants, which produced his said injuries, to his great damage, in the sum of twenty five thousand dollars ($25,000.00), wherefore he brings this suit and demands judgment against the said defendants.

HIRSH, DENT & LANDAU,
*Attorneys for Plaintiff.*

Filed Nov. 18, 1911. Presley Watts, Clerk.

9 In the Circuit Court of Covington County, Miss.

#482.

S. W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendants.

Now come Will and John Tatum, defendants in above styled cause, and for plea to the declaration therein filed against them, say that they are not guilty of the said supposed wrongs, trespasses and injuries therein complained of against them, nor of any part thereof, in the manner and form alleged in Plaintiff's declaration, and of this they put themselves upon the country.

WILL TATUM,
JOHN TATUM,
By T. BRADY, JR.,
*Attorney.*

Filed Dec. 30, 1911. Presley Watts, Circuit Clerk.

10 In the Circuit Court, Covington County, Miss.

#482.

S. W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendants.

Now comes Easterling Lumber Company, Defendant in the above styled cause, by its attorney, and for the plea to the declaration herein filed against it, says that it is not guilty of the said supposed wrongs, trespasses and injuries complained of against it, nor any part thereof, and of this it puts itself upon the country.

EASTERLING LUMBER COMPANY,
By T. BRADY, JR., *Attorney.*

Filed Dec. 30, 1911. Presley Watts, Circuit Clerk.

11 S. W. PIERCE
vs.
EASTERLING LUMBER COMPANY et al.

Now comes the Easterling Lumber Company by its attorney and says that it is not guilty of the said supposed wrongs and injuries in the manner and form alleged in plaintiff's declaration or any part thereof, and of this puts itself upon the country.

EASTERLING LUMBER COMPANY,
By T. BRADY, JR., *Att'y.*

The plaintiff will take notice that the defendant will offer under the general issue in this case, evidence to show that the plaintiff was guilty of gross negligence by running a train in violation of the orders of the Defendant Easterling Lumber Company upon its "Y" at the time when its "Shay Engine" had the right of way; that the said plaintiff should have watched at the "Y" until the "Shay" had left the "Y", and should have blown the signal which he failed to do thereby being guilty *pf* gross negligence. That the defendant was *bot* negligent—that the negligence was that of plaintiff and was gross.

EASTERLING LUMBER COMPANY,
By T. BRADY, JR.

No. 482. Filed 2nd day of July, 1912. Dan Williamson, Clerk.
By V. T. Deese, D. C.

12 In the Circuit Court of Covington County, Mississippi.

#482.

S. W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendants.

Now come the defendants in the above styled and numbered cause, by their attorney, and for plea to plaintiff's declaration therein filed against them, say that they are not guilty of the said supposed wrongs, injuries and trespasses in the manner and form as alleged against them, nor any part thereof, and of this they put themselves upon the country.

EASTERLING LUMBER COMPANY,
WILL TATUM AND
JOHN TATUM,
By T. BRADY, JR., *Their Att'y.*

The plaintiff will take notice that the defendant Easterling Lumber Company will show upon the trial of this cause that plaintiff's injury was caused by his own gross negligence in running his engine and train over this portion of the track upon which the train with which his train collided had the right of way. That the plaintiff violated the orders of the defendant and ran his engine over the "Y" of the defendant upon which the shay engine had the right of way, and was grossly negligent in so doing. That the plaintiff was injured by his own negligence and the negligence of a fellow-servant of plaintiff and not by any negligence of the Easterling Lumber Company.

Filed this 30 day of Nov. 1911. Presley Watts, Clerk.

13 In the Circuit Court of Covington County, Mississippi.

#482.

S. W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendants.

To the Honorable W. H. Hughes, Judge of the Thirteenth Circuit Court District of the State of Mississippi, including the County of Covington:

Your petitioner, Easterling Lumber Company, would respectfully show unto the court that it is one of the defendants in the above styled and numbered cause; which is now pending in the Circuit Court of Covington County, Mississippi, being a court of the State of Mississippi; that the said suit is of a civil nature at common law, and that the matter in dispute therein exceeds the sum of value of Three Thousand Dollars, exclusive of interest and costs; that this petitioner is a non-resident of the State of Mississippi, being a corporation duly incorporated under the laws of the State of Illinois.

Petitioner shows that in said above mentioned suit there is a controversy which is wholly between citizens of different states and which can be fully determined as between them, to-wit a controversy between your said petitioner, who avers that it was, at the commencement of this suit, and still is, a citizen of the State of Illinois, ans S. W. Pierce, who your petitioner avers was, at the commencement of this suit, and still is, a citizen of the State of Mississippi, and that this petitioner, Defendant ther-in, is actually interested in such controversy.

Your petitioner further shows that the other defendants named in this suit, Will Tatum and John Tatum, are residents of the State of Mississippi, and are made co-defendants with your petitioner
14 for the sole and only purpose of defeating petitioner's right of removal to the District Court of the United States of Ameriiac; that joinder of your petitioner and the said Will Tatum and John Tatum is fraudulent, and was made for the express purpose of avoiding the jurisdiction of the United States District Court, and that plaintiff's averments of joint liability are ill founded in fact and not made in good faith, with the exception of proving said joint liability upon the trial. Petitioner avers that the said Will Tatum and John Tatum are not interested in the case, that a judgment cannot be collected against them, and are but sham defendants fraudulently named as defendants in said declaration, as before stated, for the express purpose of avoiding the jurisdiction of the Federal Court, which purpose and intention and joinder is fraudulent, void and wholly ineffective.

Petitioner shows further that there is a separable controversy between plaintiff and defendants, since plaintiff's right of action against petitioner, if he has any (which is here denied) is based upon a breach of duty to plaintiff separate and distinct and different from

any duty owed to plaintiff by the said Will and John Tatum, for a breach of which they might become liable to plaintiff, wherefore, said controversy is separable.

Petitioner shows that this petition is filed within, and before the expiration of, the time allowed to defendant by the laws of the State of Mississippi, or the rules of this court, to plead, answer or demur to said declaration.

Your petitioner presents herewith a bond, with good and sufficient surety, for its entering the District Court of the United States for the Southern District of Mississippi, Jackson Division, at Jackson, Hinds County, Mississippi, within thirty days from the date of filing this petition, a certified copy of the record in such suit, and for paying all costs that they may be awarded by the said District Court if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner prays that this court proceed no further herein except to make an order of removal, and to accept the said
15 surety and bond, and to cause the record herein to be removed into said District Court of the United States within thirty days of the filing hereof.

EASTERLING LUMBER COMPANY,
By T. BRADY, JR., *Att'y.*

STATE OF MISSISSIPPI,
*Covington County:*

I, W. D. Reimers, being duly sworn, do depose and say that I am agent of the Easterling Lumber Company, Defendant and Petitioner in the above entitled cause; that I have read the foregoing petition, and know the contents thereof; and that the statements and allegations therein contained are true, as I verily believe.

W. D. REIMERS.

Sworn to and subscribed before me this the 27th day of December, A. D. 1911.

W. L. KELLY,
*Notary Public.*

No. 482. Petition for removal to District Court of United States. Filed this 28th day of December, 1911. Presley Watts, Clerk.

16 In the Circuit Court of Covington County, Mississippi.

No. 482.

S. W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendants.

Know all men by these presents, that we, Easterling Lumber Company, Principal, and W. D. Reimers and E. E. Burns, Sureties,

residents of the County of Covington State of Mississippi, are held and firmly bound unto S. W. Pierce, plaintiff in the above styled and numbered case, his suc-essors and assigns, in the sum of Five Hundred Dollars ($500.00), lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, and each of us, our heirs, executors and administrators, jointly and severally by these presents:

Yet upon this condition: That whereas, the said Easterling Lumber Company has applied by petition to the Circuit Court of Covington County, State of Mississippi, for the removal of a certain cause therein pending, wherein the above named party is plaintiff and the said Easterling Lumber Company and W. W. Tatum are defendants, to the District Court of the United States of America, for the Southern District of Mississippi Jackson Division on the grounds in the petition set forth, and that all further proceedings in said action in said court of Covington County be stayed.

Now, therefore, if your Petitioner, the Easterling Lumber Company, shall enter into said United States District Court for the Southern District of Mississippi, Jackson Division, a- aforesaid, within thirty days from the date this bond is filed, a copy of the
17 record in said suit, and shall pay or cause to be paid all costs that may be awarded therein by said Circuit Court of the United States, and if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise shall remain in full force and effect.

Witness our signature this the 27th day of December, A. D. 1911.

EASTERLING LUMBER COMPANY,
By T. BRADY JR., *Gen. Att'y.*
W. D. REIMERS, *Surety.*
E. E. BURNS, *Surety.*

STATE OF MISSISSIPPI,
*Covington County:*

W. D. Reimers and E. E. Burns the sureties named in the foregoing bond, being first duly sworn, each for himself deposes and says as follows: I am the same person whose name is subscribed to the foregoing bond and I state I am a householder and resident of the County and State aforesaid, and that I am worth the sum of $500.00 named therein as the penalty thereof, over and above all just debts and liabilities, exclusive of penalty which is exempt from execution.

W. D. REIMERS.
E. E. BURNS.

Sworn and subscribed before me, This the 27th day of December, A. D. 1911.

PRESLEY WATTS,
*Circuit Clerk.*

Bond for removal. Filed Dec. 29th, 1911. Presley Watts, Clerk.

18 In the Circuit Court of Covington County, Mississippi.

#482.

S. W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendants.

To the Honorable W. H. Hughes, Judge of the Thirteenth Circuit Court, District of the State of Mississippi, including the County of Covington:

Your petitioner, Easterling Lumber Company, would respectfully show unto the court that it is one of the defendants in the above styled and numbered case, which is now pending in the circuit Court of Covington County, Mississippi, being a court of the State of Mississippi—that said suit is of a civil nature at common law, and that the matter in dispute therein exceeds the — or value of three thousand dollars, exclusive of interest and costs; that this petitioner is a non-resident of the State of Mississippi, being a corporation duly incorporated under the laws of the State of Illinois.

Petitioner shows that in said above mentioned suit there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to-wit, a controversy between your said petitioner, who avers that it was, at the commencement of this suit, and still, is a citizen of the State of Illinois, and S. W. Pierce, who your petitioner avers was, at the commencement of this suit, and still is, a citizen of the State of Mississippi, and this petitioner, defendant therein, is actually *is* -nterested in such controversy.

Your petitioner further shows that the other defendants named in this suit, Will Tatum and John Tatum, are residents of the State of Mississippi, and are made co-defendants with your petitioner for the sole and only purpose of defeating petitioner's right of removal to the District Court of the United — of America;

19 the joinder of your petitioner and the said Will Tatum and John Tatum is fraudulent and was made for the express purpose of avoiding the jurisdiction of the United States District Court, and that plaintiff's averments of joint liability are ill founded in fact and not made in good faith, with the exception of proving said joint liability upon the trial.

Petitioner avers that the said Will Tatum and John Tatum are but sham defendants, fraudulently named as defendants in said declaration, as before stated, for the express purpose of avoiding the jurisdiction of the Federal Court, which purpose and intention the joinder is fraudulent, void and wholly ineffective.

Petitioner avers and shows that Will Tatum was on the train on which *which* the plaintiff was engineer at the time of the collision; that the collision did not occur on account of the negligence of the said Will Tatum, or on account of the negligent order — the said Will Tatum, That said Will Tatum was without actual knowledge

of the location of either of the engines which collided until the collision was in the act of taking place. The said collision was not caused by the negligence of the said Eill Tatum and there is no concurrent negligence as averred in plaintiff's Declaration. That petitioner avers that John Tatum was not negligent in any way and that negligence on his part did not cause the injury to the plaintiff, and that John Tatum had the right of way over the track upon which the collision occurred. That there was no negligence on the part of any one except that of the plaintiff himself. That the allegation in the plaintiff's Declaration that there is concurrent negligence, is not in fact true, and was made only for the purpose of defeating the jurisdiction of the United States District Court. That John Tatum, while named as a defendant, has not been summoned, so petitioner believes and avers. That the said John Tatum and Will Tatum have no property out of which a judgment could be collected and this plaintiff well knows and in fact never
20 expected to use the Defendants Tatum except for the purpose of defeating the jurisdiction of the United States District Court. The negligence causing the injury was that of the plaintiff in disobeying the orders of the petitioner and not by the negligence of the petitioner or Will Tatum and John Tatum. Said joinder of the said Will Tatum and John Tatum is fraudulent, and they are sham defendants.

Petitioner shows further that there is a seperable controversy between plaintiff and defendants, since plaintiff's right of action against petitioner, if he has any (which is here denied), is based upon a breach of duty to plaintiff separate and distinct and different from any duty owed to plaintiff by the said Will and John Tatum, for a breach of which they might be liable to plaintiff, wherefore, said controversy is seperable.

Petitioner shows that this petition is filed within, and before the expiration of, the time allowed Defendants by the laws of the State of Mississippi, or the rules of this court, to plead, answer or demur to said declaration, and after notice to plaintiff.

Your petitioner presents herewith a bond, with good and sufficient surety, for its entering in the District Court of the United States for the Southern District of Mississippi, Jackson Division, at Jackson, Hinds County, Mississippi, within thirty days from the date of filing this petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the District Court if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner prays that this court proceed no further herein except to make an order of removal, and to accept the said surety and bond, and to cause the record herein to be removed into said District Court of the United States within thirty days of the filing hereof.

EASTERLING LUMBER COMPANY.
By T. BRADY, JR.

21 STATE OF MISSISSIPPI,
*Covington County:*

I, W. D. Remiers, being duly sworn, do depose and say that I am superintendent of Easterling Lumber Company, defendant and petitioner in the above styled cause; that I have read the foregoing petition, and know the contents thereof; and that the statements and allegations therein contained are true, as I verily believe.

W. D. REMIERS.

Sworn to and subscribed before me, this the 1st day of January, A. D. 1912.

DAN WILLIAMSON,
*Circuit Clerk.*

No. 482. Petition for removal. Filed January 1st, 11:45 A. M., A. D. 1912. Dan Williamson, Circuit Clerk.

22 In the Circuit Court of Covington County, Mississippi.

#482.

S. W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendants.

Know all men by these presents, that we, Easterling Lumber Company, principal, and W. D. Remiers and J. F. Rutledge, sureties, residents of the County of Covington, State of Mississippi, are held and firmly bound unto S. W. Pierce, plaintiff in the above styled and numbered case, his successors and assigns, in the sum of Five Hundred Dollars ($500.00), lawful money of the United States of America, for the payment of which well and truly — be made, we and each of us bind ourselves, and each of us, our heirs, executors and administrators, jointly and severally by these presents.

Yet upon this condition; That, whereas, the said Easterling Lumber Company has applied by petition to the Circuit Court of Covington County, State of Mississippi, for the removal of a certain cause therein pending, wherein the above named party is Plaintiff and the said Easterling Lumber Company and W. W. Tatum and John Tatum are defendants, to the District Court of the United States of America, for the Southern District of Mississippi, Jackson Division, and that all further proceedings on the ground in the petition set forth, and that all further proceedings in said action in said Court of Covington County be stayed.

Now, therefore, if your petitioner, the Easterling Lumber Company, shall enter in said United States District Court for the Southern District of Mississippi, Jackson Division, aforesaid, within thirty days from the date this bond is filed, a copy of the record in said suit and shall pay or cause to be paid all costs that may be awarded therein by said Circuit Court of the United States, if said

23 court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise shall remain in full force and effect.

Witness our signature this the 1st day of January, A. D. 1912.

EASTERLING LUMBER COMPANY,
By T. BRADY, JR.
J. F. RUTLEDGE, *Surety.*
W. D. REIMERS, "

STATE OF MISSISSIPPI,
*Covington County:*

W. D. Reimers and J. F. Rutledge, the sureties named in the foregoing bond, being first duly sworn, each for himself deposes and says as follows: I am the same person whose name is subscribed to the foregoing bond and I state I am a householder and resident of the County and State aforesaid, and that I am worth the sum of $500.00 named therein as the penalty thereof, over and above all just debts and liabilities, exclusive of penalty which is exempt from execution.

W. D. REIMERS.
J. F. RUTLEDGE.

Sworn to and subscribed before me, this the 1st day of January, A. D. 1912.

R. NORWOOD, *Clerk.*

Removal Bond, approved and Filed January 1st, A. D. 1912. Dan Williamson, Clerk.

24

S. W. PIERCE
vs.
EASTERLING LUMBER COMPANY et al.

This cause came on to be heard upon petition of defendant to remove the cause to the United States Distr-ct Court, and after consideration of the petition, it is hereby sustained, and the case is hereby removed to the United States District Court, sitting in Jackson, Mississippi.

25 In the District Court of the United States of America for the Southern District of Mississippi, Jackson Division.

No. 6571.

S. W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendants.

I, L. B. Moseley, Clerk of the District Court of the United States of America for the Southern District, Jackson, Division, do hereby certify that at the regular May 1912 Term, District Court of the

United States of America, for the Southern District, Jackson Division, held at Jackson, Mississippi, in May, 1912, the following order in the case of S. W. Pierce vs. the Easterling Lumber Company et als., No. 6571 Civil Docket was made on the 7th day of May, 1912, and is entered in Minute Book No. —, page — to-wit:

No. 6571.

S. W. PIERCE
vs.
EASTERLING LUMBER COMPANY et al.

"This cause coming on to be heard on this the 7th day of May, 1912, upon the motion of the plaintiff to remand this cause to the Circuit Court of the County of Covington, in the State of Mississippi and upon the evidence in support of said motion and counsel for the respective parties having been made, and the same having been duly considered by the court, it is ordered that the said motion be, and the same is hereby granted, and the cause is hereby remanded to the Circuit Court of the County of Covington, in the State of Mississippi.

"It is further ordered that the Easterling Lumber Company defendant herein, be taxed with all costs in this behalf expended, for which let execution issue."

This is a true and correct copy of said order as it appears of record in my office.

In testimony whereof I hereunto set my hand and seal of office, this 26th day of June, A. D. 1912.

L. B. MOSELEY, *Clerk*.
By B. L. TODD, JR., *Dct. Clerk*.

Certified copy of order remanding said cause. Filed January 27, 1912. Dan Williamson, Clerk.

26 In the Circuit Court of Covington County, Mississippi.

S. W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendants.

To M. O. Thrapp, Official Court Stenographer, Thirteenth Circuit Court District, State of Mississippi:

This notice to you in writing, as requested by Chapter III of the Laws of 1910, that a copy of the stenographer's notes in the case of Sam W. Pierce v. Easterling Lumber Company, et al. is desired for the purpose of appealing the case. You are requested and desired to furnish a copy of said notes, as required by Chapter III of the Laws of 1910.

EASTERLING LUMBER COMPANY,
By BRADY & DEAN &
J. J. STUBBS,
*Attorneys.*

To Dan Williamson, Circuit Clerk:

We, T. Brady, Jr., and J. J. Stubbs, attorneys representing the Easterling Lumber Company in the case of Sam W. Pierce v. Easterling Lumber Company, hereby certify that the above and foregoing is a copy of the notice served by us upon M. O. Thrapp personally, upon this date, and within thirty days from the adjournment of court, said notice of which the above is a copy.

Witness our signatures, this the 17th day of July A. D. 1912.

BRADY & DEAN.
J. J. STUBBS.

Filed within thirty days from the adjournment of the July 1912 Term of Circuit Court of Covington County, this the 17th day of July, A. D. 1912.

DAN WILLIAMSON,
*Circuit Clerk.*

Filed 17th day of July 1912. Dan Williamson, Clerk, by V. T. Deese, D. C.

27 *Order of Extension.*

In the Matter of

S. W. PIERCE
vs.
EASTERLING LUMBER COMPANY et al.

Tried in the Circuit Court of Covington County, July Term, 1912.

I, W. H. Hughes, Judge of the Thirteenth Circuit Court District of the State of Mississippi, hereby grant unto M. O. Thrapp, Official Stenographer pro tem. of said Circuit Court District, Sixty (60) days' extension of time from this date in which to file a transcript of his stenographic notes, taken at the trial in the above styled cause, at Collins, Miss., July Term of Circuit Court of Covington County.

Given by me, this 10th day of September, A. D. 1912.

W. H. HUGHES, *Judge.*

Filed 12th day of September, 1912. Dan Williamson, Clerk.

28 STATE OF MISSISSIPPI,
*Covington County:*

In the Circuit Court.

S. W. PIERCE
vs.
EASTERLING LUMBER COMPANY et al.

Now comes the plaintiff by attorneys and moves the court to require the defendants the Easterling Lumber Company, Will Tatum

and John Tatum to submit to the plaintiff or his attorneys for an inspection and copy or permission to take copies of any and all books, papers or documents in the possession of the defendants or under their control, containing evidence or statements relating to the movements of any and all trains run on its log road as described in plaintiff's declaration in October 16, 1911, that it will also make application to be permitted to take copies or inspect all letters and all correspondence had by and between the defendant Lumber Company and T. R. Thames, its agent, containing statements or evidence relative to the right of the train on said road on October 15th, 1911, and also any and all letters from the Superintendent, General Manager or other employees of said Easterling Lumber Company to O. L. Benway of the Easterling Lumber Company, and any and all correspondence had by and between the Easterling Lumber Company and all employees connected therewith touching or relating to the movements of trains on said road on October 16th, 1911, and also any and all statements made by the defendant- or either of them and now in the hands of defendant, its attorneys, or other employees, containing evidence or statements relative to the rights of said train on said road on October 16th, 1911 and any and all statements made or correspondence had by and between the Defendant, the Easterling Lumber Company and the London
29 Guarantee and Accident Company, Limited of London, England with branch offices in the United States, touching or relating to said accident or the running of trains on said road on date set forth in declaration.

E. L. DENT,
HIRSH, DENT & LANDAU,
*Attorneys for S. W. Pierce, Plaintiff.*

Answered by Def'ts' counsel verbally to court and counsel, stating that defendants had no such relevant evidence in *his* possession or under *his* control.

This answer accepted by plaintiff's counsel July 3, 1912.
W. H. HUGHES, *Judge.*

Filed 27th day of June, 1912. Dan Williamson, Clerk.

30 STATE OF MISSISSIPPI,
*Covington County:*

In the Circuit Court.

S. W. PIERCE
vs.
EASTERLING LUMBER COMPANY et al.

To the Easterling Lumber Company, Will Tatum, and John Tatum, Defendants, or Honorable T. Brady, Jr., their attorney of record:

You are hereby notified that on Monday, July 1st, 1912, the plaintiff in this case will make application, to the Circuit Court of said

County and State, for an inspection and copy of permission to take copies of any and all books, papers or documents in the possession of the Defendants or under its control, containing evidence or statements relating to the movements of any and all trains run on its log road as described in plaintiff's declaration on October 16th*m* 1911; that it will also make application to be permitted to take copies or inspect all letters and all correspondence had by and between the Defendant Lumber Company and T. R. Thames, its agent, containing statements or evidence relative to the right of the train on said road on October 16th, 1911, and also any and all letters from the superintendent, General Manager, or other employees of said Easterling Lumber Company to M. O. Benway of the Easterling Lumber Company and any and all correspondence had by and between the Easterling Lumber Company and all employees connected therewith touching or relating to the movements of trains on said road on October 16th, 1911, and any and all statements made by the defendants or either of them and now in the hands of defendants, its attorneys or other employes, containing evidence statements relative
31 to the rights of said train on said road on October 16th, 1911, and any and all statements made or correspondence had by and between the defendant, the Easterling Lumber Company and the London Guarantee and Accident Company Limited of London England, with branch officers in the United States touching or relating to said accident or the running of trains on said road on date set forth in declaration.

This application will be made pursuant to action 1003 of the Code of 1903.

That said application for inspection will be presented at 10 o'clock A. M. on Monday July 1st, or as soon thereafter as the same can be heard by the court.

E. L. DENT,
HIRSH, DENT AND LANDAU,
*Attorneys for S. W. Pierce.*

We hereby certify that we have this day mailed postage prepaid, to Hon. T. Brady, Jr., Brookhaven, Miss. a copy of the application and motion attached hereto in the above entitled case.

This the 26th day of June, 1912.

E. L. DENT,
HIRSH, DENT & LANDAU,
*Attorneys for Plaintiff.*

32

No. 530.

S. W. PIERCE
vs.
EASTERLING LUMBER COMPANY et al.

Tried in the Circuit Court, Covington County, July Term, A. D. 1912.

Appearances:

Messrs. Hirsh, Dent & Landau, Vicksburg; Hon. E. L. Dent, Collins, Counsel for Plaintiff.

Hon. T. Brady, Brookhaven; Hon. J. J. Stubbs, Collins, Counsel for Defendants.

S. W. PIERCE (white), the Plaintiff, being called as a witness in his own behalf, and being duly sworn testified as follows:

Direct examination.

(By Mr. E. L. DENT:)

Q. What is your name?
A. S. W. Pierce.
Q. Where do you live Mr. Pierce?
A. I live at Ora.
Q. In what County and State?
A. Covington County, State of Mississippi.
Q. Are you a man of family?
33 A. Yes sir.
Q. Of what does your family consist?
A. Wife and one child.
Q. What is your age?
A. 29 years old.
Q. What was your weight before you were injured?
A. 147 pounds.
Q. How much do you weigh now?
A. 133 pounds.
Q. You are the plaintiff in this case?
A. Yes sir.
Q. Where is the Easterling Lumber Company doing business in this county?
A. At Ora.
Q. What has it at Ora?
A. It has a saw mill and shops and commissary, lumber yard, and dry kilns.
Q. State to the jury whether or nor they have a line of railroad that extends from the town of Ora on the Gulf and Ship Island Railroad in an easterly direction, and if so, what is that line?
A. It is in a westerly direction; it was around 22 or 23 miles long; I don't know the exact distance.

Q. The Easterling Lumber Company that is domiciled at Ora is the defendant in this case?

A. Yes sir.

Q. Will Tatum and John Tatum over here (indicating) are the defendants in this case?

A. Yes sir.

Q. What position did these two gentlemen occupy with the Lumber Company at the time you were injured?

A. Mr. Tatum was General Superintendent and Acting Train Master, and Mr. John Tatum was firing and working on the loader or doing anything they told him to do—switching——

34 Q. When did this injury occur?

A. The 16th day of October, in the morning, about 6 o'clock.

Q. The principal plant of this concern is where?

A. At Ora, I suppose——

Q. That is in this state?

A. Yes sir.

Q. What was your occupation?

A. I was a locomotive engineer.

Q. Tell the jury how long you had been locomotive engineer?

A. I had been running an engine between 8 and 10 years.

Q. Tell these gentlemen where you have had experience for different concerns?

A. I ran an engine here in Collins 4 months for the Williamburg Lumber Company, and I ran an engine 3 years 3 months for Col. Woods, and also for the Keystone Lumber Co. out of Bogue Chitto a year, and I worked for the Tioga & Southeastern Railroad out at Tioga, Louisiana, between 2 and 3 years as foreman over the engines and done the extra running there and had charge of the men. I also worked for the Mississippi Central Railroad.

Q. When did you get back to Ora?

A. I came there the early part of last summer—Sometime in May.

Q. Please state what people lived there that are related to you? Do your people live there—or your wife's people?

A. My wife's mother and father live there.

Q. During the time of your service, Mr. Pierce, what was your earning capacity, per month, as engineer?

A. I worked down here for Col. Woods for $75 a month.

By Mr. BRADY: Wait a minute, Mr. Pierce. We think it is improper for the witness to testify what his earning capacity has been. What it was at the time of the accident is competent, but

35 what it was prior to the accident and elsewhere is incompetent, and to that we object.

Sustained. Exception.

Q. Tell the jury what you earned at the time you got crippled, if any thing?

A. They were giving me $75.00 per month.

Q. Tell the jury how and when they paid that?

A. They paid Saturday the nearest the 20th of each month—nearest the 10th of each it was.

Q. Tell the jury what contract you had with them, how much they were paying you?

A. Mr. Will Tatum is the man that employed me—the superintendent of this railroad. He hired me to run an engine at $75.00 a month.

Q. You drew your pay when?

A. The nearest Saturday to the 10th.

Q. Tell the jury how much you would draw at the end of each month?

A. $72.00 if I didn't take out any punch-outs or coupons, as they call them.

Q. They contracted to pay you $75.00 and actually paid you in money $72.00?

A. Yes sir.

Q. Now, on October 16, 1911, what was you doing?

A. I was running an engine for the Easterling Lumber Company. I had left the mill——

Q. What engine were you running?

A. Engine No. 6.

Q. That run from where to where?

A. From the Mill to the Camps.

Q. That engine was run by you under the direction of whom?

A. Will Tatum.

Q. You say he was the Superintendent of the railroad, or General Foreman?

36 A. He was general foreman; he is the man that hires the engineers, fireman, and brakeman, and discharges them, and is general foreman of the railroad department.

Q. On the morning of October 16, 1911, what did you do?

A. I went to the shop to get my engine ready to go out.

Q. To go from where to where?

A. From the Easterlings Lumber Company's mill to the Easterling Lumber Company's Camps.

Q. What was your train used for, in the morning on that trip?

A. On that morning trip?

Q. Yes.

A. *It* To haul the men, or passengers—the men that work out there, to where they work.

Q. To carry them from the mill to work?

A. To the camps or where they work out there.

Q. What distance was that?

A. I don't know exactly; it was between 18 and 20 miles; some of them called it fifteen and some 18; road has never been measured, I don't know the exact distance.

Q. What were your orders with reference to running that train from where to where?

A. I had orders to run it from the mill to the camps to carry these men.

Q. What orders, if any, did you have to take any sidings?

A. None what ever.

Q. In order to run it from the mill to the camp where you were carrying these people you say were employees or passengers on your train, who had the right of way from the mill to the camp?

A. The engine I was running—engine No. 6 had the right of way.

Q. That is a single line of railroad, is it?

A. Yes sir.

37 Q. Now, then, what time did you get up to take charge of that engine?

A. Half past three.

Q. What time did you take charge of it?

A. Just before five o'clock in the morning. I was down there to get sand and get my engine ready to go out to the woods.

Q. What did you do?

A. I got sand on the engine and got every thing ready to go out—oiled around and got the machinery in running order?

Q. What did you do then?

A. I left on my time, or as near my time as I could get off. I was supposed to leave there at five o'clock at that time—that is the orders I had.

Q. Who gave you those orders?

A. Will Tatum.

Q. When did he give it to you?

A. About a week before I got hurt on the 16th of October.

Q. What did you do after the train had been loaded with the employees to go out to the lumber camp—what did you do?

A. I got on and run my engine out as soon as I could, and picked up men that lived along the road where they got on at stops.

Q. Who was on that train with you, with reference to the superintendency?

A. I don't know how many were on there—some 30 or 35.

Q. With reference to the defendants here—which one of these defendants were on there with you, if there were either one on there?

A. Mr. Will Tatum was on there.

Q. Is that the same man that had charge of the train?

A. Yes sir.

Q. What part of the train did he occupy?

A. He was on a car behind the engine.

Q. Were you to carry him to the log camp?

38 A. Yes sir, that was the only way he got out there was on that train.

Q. Went along with the other pas-engers?

A. Yes sir.

Q. What if anything happened to you while making that trip?

A. I didn't understand the question?

Q. Tell the jury what if any thing happened to your engine and to you while making that trip—what if anything happened to you or the engine while making that trip?

A. We had a head on collision some ten or twelve miles out.

Q. What engine or train ran on you?

A. It is what they called the Shay Engine. It is engine No. 5 but it went by the name of the shay engine.

Q. Who was in charge of that engine?

A. Mr. John Tatum was running it and Please Everett was firing it.

Q. Tell the jury whether they had any right on that track there at that time?

A. No sir, they didn't have any right whatever. I had orders to carry my men to the camp at 6 o'clock in the morning and get the men out to the camp, and I had orders to run my engine to the Camp that morning, and had orders against anything being on the track in my way.

Q. Tell the jury whether Mr. Tatum or anybody else connected with the Easterling Lumber Co., notified you the Shay Engine would be on that track?

A. No sir.

Q. Tell the jury whether or not you knew it was on there?

A. No sir.

Q. Tell the jury what was the proper place for that engine?

A. The engine usually stayed all night at the camp, unless it stayed at the Camp Saturday evening to do some work over Sunday, but ordinarily it stayed at the camps.

Q. If the Shay Engine came to the "Y" what devolved upon them to give you notice——

39 A. If the Shay Engine came to the "Y".

Q. Yes?

A. I never saw it there in the morning; I have seen it there in the day, but not in the early morning.

Q. If they run it out there, what orders or notice are they supposed to give you?

A. They are supposed to give me orders if there is anything for me to run against, but they didn't give me any.

Q. When the head on collision occurred, what happened to you?

A. I had my leg cut and badly bruised, and my body was bruised.

Q. Tell the jury how it happened?

A. I was running the engine as near on time as I could. I Had orders to leave the mill at 5, but we had been leaving at 5:30 every morning; and Mr. Will Tatum told me a week or ten days before that, "I want you to leave the mill at 5 o'clock, if you leave every body but your fireman. We have got to get these men to the camp on time". I had been getting up at four o'clock, so I went to getting up at half past three, and I got to the mill to leave at 5 o'clock, but that morning we left 8 or 10 minutes after 5, and I was going on my run to the camps where I went every morning, and I got out some 9, 10 or 12 miles,—I don't know the exact distance,—that the road hasn't been measured that I know of, and I run into the Shay engine coming towards the mill and I was going to the Camps.

Q. State whether they run into you or you run into them?

A. They run into me because I had a right of way over the track, and they knew they were on my time, as they knew my engine was due and I didn't know anything about their engine as it should be at the camp when I got there or gone on west for logs. I was on what we call the "middle haul", to take the logs off at the Camp and bring them to the "Y" and deliver them to the main line engine, and some mornings when I got out there this Shay engine would be gone west from the camps to bring the logs, and sometimes they wouldn't be gone.

40 Q. State just what happened when the engines collided and what you did?

A. The first thing, I saw the engine, about 30 or 40 yards, some short little distance from me. I blew my whistle. One short blast of the whistle on a railroad is to apply brakes, and I shut off my throttle and reversed my engine, and I saw they were going to hit, and I couldn't go out through the window. The gang-way is the place between the engine and the tender, and as I was getting out the gangway, the engines hit and the bolt that holds the tender down to the frame of the engine,—those bolts broke, and as I made my jump it must have caught me in the air, and caught my foot between the cab of the engine and the tank, and I hung head down; and I had used some water——

Q. You hung by the head—downward towards the ground?

A. Yes sir, and I had used some water out of this tank making that 10 or 12 miles and I suppose the tank was two thirds full of water, and in sloshing back and forth when they had the collision, it pulled the tank back off my foot and let me loose, and I fell out some ten or twelve feet——

Q. Who did you try to help out of the engine at the particular time?

A. Mr. Tom Perkins and his wife and the firemen. And Mrs. Perkins got down in this small space between the tank of the engine and the cab and was fixing to climb on the steps, and she was in my way, and someone was in the gang-way on the other side, and I didn't want to shove the lady out, as it might break her neck or kill her, and I grabbed her by the neck and pushed her up in the space;—some call it the coal space, and some the wood space.

Q. Was that a place of safety?

A. Yes sir by my putting her in there she——

Objection. Sustained.

41 Q. Don't state what would have hap-ened. You took the woman out of the place—in getting out yourself you pushed or helped her out of the way?

A. Yes sir.

Q. And then you undertook to get off then?

A. As soon as I could get rid of her I tried to jump and it caught me.

Q. Now, tell these gentlemen on your oath what you could have

done there that wasn't done for your own safety, and for the safety of your passengers, at that particular time?

A. I don't exactly understand the question?

Q. Tell them what you could have done, if anything, that you didn't do that would have protected yourself and passengers?

A. I don't know; I did all I could to protect the people I hauled. You know the man that runs the train has the lives of other people in his hands, and I protected them as far as I could, and I saw they were going to hit, and there was nothing to do but get off and save my life, and after I saw they were going to hit and had the breakes set and reversed in the opposite motion, I left them to hit, and was trying to jump and got caught.

Q. Who was running the Shay engine?

A. John Tatum.

Q. Who is John Tatum?

A. John Tatum is a man that works around the loading crew, he fires engines and breaks some, and does most anything they call on him to do.

Q. I will ask you to state to the jury whether or not he was a competent or incompetent man to run an engine at that time, on that road?

A. He is not a competent man. I have been knowing John Tatum since I first came to this country 7 years ago last January.

42 Q. I will ask you to state if John Tatum knew that No. 6 *run had* or was to run out that morning from the mill to the camp?

By Mr. BRADY: Don't tell it unless you know of your own knowledge.

Q. Did Mr. Tatum know your engine was due to go out from the mill to the camp, from the mill?

A. Mr. John Tatum had *road* backward and forward on engines enough and had broke and fired on them enough to know the way those trains were run. I have been knowing the Tatums for seven years and he has been in and around Ora all that time. He might have been away from there during the panic, but he has been in and out of there since I went to work there seven years ago last January.

Q. You say he was not an engineer?

A. No sir, he was not an engineer.

Q. He wasn't competent to run that train?

A. No sir, he wasn't.

Q. About what time did the collision occur, or the exact time if you know?

A. I don't know the exact time. It was right after six o'clock after I had fell out of my engine and had been out there three or four minutes, it was five minutes after six, it might have been 2 minutes to six or 2 minutes after that.

Q. This accident occurred on the "Y"?

A. Between the two switches on the "Y".

Q. And you were on the main line of the "Y"?
A. Yes sir; the "Y" makes prongs—2 prongs off the main line, and I was on the main line on the "Y".
Q. At what rate of speed were you running?
A. 10 or 12 miles an hour.
Q. Was that the usual or unusual rate of speed?
43 A. It is supposed to be 12 or 14 or 16 from the mill to the Camp. We had orders to leave the mill at five o'clock. We had left there at 5:30 and wanted to get the men to the camps by 6 o'clock. We were supposed to make the 15 or 16 miles by six o'clock to get the men to the camp to work, and that would make us go 14 or 16 miles somewhere along there.
Q. What right, if any, did Mr. John Tatum have—Who was in charge of the Shay engine—The Fireman?
**A. He had a fireman.**
Q. What notice did Mr. Tatum or anybody else connected with the Lumber Company, if any body gave you, to look out for this Shay engine at the place or near the place it struck?
A. Nobody whatever; I didn't have any orders whatever to that effect.
Q. Running the Shay engine on the line you were running on at that time and under the circumstances there, what could you have done if anything, to prevent the collision?
A. I couldn't have done anything. *O* wasn't looking for it or anything like that. It is like a man that is not looking for lightning to strike him, and I wasn't expecting it at all. I wasn't expecting it until I got to the camps some two or three miles from there.
Q. I will ask you to state how that effected your leg, to be swung down that way?—Did you fall over or not?
A. There is a step that you step on an engine, and I fell over that, and something hit me in the side. I don't know what it was, but I suppose it must have been that step, because it was just the right height to hit me.
Q. Tell the jury what effect that fall and your leg getting caught there had on you at that time.
44 A. Right after I was hurt I got awful sick. I suffered enough to kill half a dozen men. I got hurt at six o'clock that morning and I lay in the woods two hours until they got an engine there to get me back to the mill.
Q. State what effect if any, it had on that foot and leg?
A. It broke my foot and ankle all to pieces, and broke the bone of my leg.
Q. Pull up your pants and show the jury your leg.

(Here the witness took off his sock and showed leg to jury.)

Q. Were there any marks and bruises put on that leg?
A. They carried me to Hattiesburg after I was hurt that morning.
Q. What caused those scars to be there?
A. After I got hurt I lay in the woods so long until my leg puffed out and was turning black, and I got to Hattiesburg on that train

that leaves here at 10:30 and they carried me to the South Mississippi Infirmary, and I laid there until about 7 o'clock Tuesday morning, and they put me to sleep——

Q. I will ask you to please state to the jury what was the character of that limb before you were injured in that head-on collision in which this Shay engine run into you?

A. It was good there wasn't a thing the matter with it.

Q. With reference to comparison—how did it compare with your left leg?

A. I couldn't see any difference; they were both just alike—one was as big as the other.

Q. State whether or not at that time you were an invalid or a stout, able bodied man?

A. I was stout, able-bodied and working every day.

Q. Where were you raised Mr. Pierce?

A. I was raised at Crystal Springs, Copiah County, Miss.

Q. Were you raised on a farm?

A. Yes sir I stayed on a farm until I was 16 years old.

45 Q. State whether or not the right leg that is off was a normal leg, like your left leg now?

A. Yes sir it was just as good a leg as that one is. There was no difference in them as I could see. It was so I could work every day and go on Sunday.

Q. Now Mr. Pierce tell the jury what was the character of your habits at that time—whether you were a drinking or a sober man?

A. I am a sober man, I do not drink whiskey.

Q. Tell the jury how often you worked at that time?

A. I worked every day in the week and lots of times on Sunday until they converted me last summer at a meeting, and I haven't worked on Sunday, and didn't work on Sunday until a couple of weeks before I got hurt. I had worked daily up to that time and hadn't worked on Sunday, but before then I had worked every day in the week when I had a job, and it is a usual thing to work six days in the week, and work also on Sunday in order to get work the next week.

Q. Tell the jury what ailments or crippled limbs you had before you were injured?

A. None whatever, I was in good health.

Q. Could you work when you got out of the hospital?

A. No sir I couldn't get on the car.

Q. What was the condition of your leg when you were brought back?

A. My leg was in bad shape when they brought me back to the hospital.

Q. Tell the jury what suffering you underwent?

A. They carried me to the Southern Hospital Infirmary, and I think I stayed there lacking two days of two months. The day after I got there, the next morning, they operated on my leg and they cut thirteen gashes in there and my foot, and they took part of my ankle bone, and they probed through there, and they

46 took those places where the scars are on my leg and stuffed them full of medicated gauze every morning and left it until

the next morning, and then they would come and pull it out, and it was like pulling your eyes out; and they gave me hypodermics and opiates, and they told me——

Q. Don't tell what they told you. How were you suffering while they were carrying you from the place where the wreck occurred, to Ora?

A. I suffered as much as any man could suffer, and live, I was suffering all I thought a man could.

Q. Who took charge of you and took you to Hattiesburg?

A. I think they sent Mr. Bob Easley.

Q. At whose instance were you sent there?

A. The company sent me there I guess.

Q. What company?

A. The Easterling Lumber Company.

Q. Had you made any suggestions?

A. At the time I got hurt I ask- them not to carry me home, my wife was sick at the time, and knew what effect it would have on her.

Q. Don't state anything about that. You say the Easterling Lumber Company sent you there?

A. Yes sir.

Q. Who is in charge of that Hospital?

A. Dr. Crawford is the head man.

Q. Who did the cutting on your leg?

A. Dr. Crawford and Dr. Hightower.

Q. I will ask you if you have ever been presented with a bill for the amount of the hospital fees down there?

Objection.

47 By Mr. DENT: It is for the purpose of showing—I asked him if he had been presented with a bill, to show how much he owes that concern.

By the COURT: Go ahead and answer it.

To which action of the court the defendant then and there excepted.

Q. Tell the jury whether or not you owe this bill? What was your doctor's bill there?

A. I haven't found out I asked Dr. Crawford what it was, and he said "I will let you know later on"; and I was down there since and he has never sent me a bill.

Q. Do you know what it was?

A. No sir. I heard before I left there——

Q. Don't state what you heard. After you were in the hospital you say you came back to Ora two months?

A. Yes sir.

Q. When you came back to Ora where did you go?

A. To Mr. Williams', my father-in-law.

Q. After you got back home who treated your foot?

A. Mr. Davis the Company's physician at Ora treated me.

Q. Have any fees been charged there, and if so, how much, and state if they have been paid?

A. He told me what I would have to do, but he has not give me a bill.

Q. Don't tell what he told you. State to the jury whether or not he has made any charge of that?

A. No sir he hasn't sent me a bill.

Q. Who sent Dr. Davis to you?

A. Dr. Crawford called him up before he would let me leave the hospital and asked him——

48 Q. Do not tell what Dr. Crawford said. Did you send for Dr. Davis to go and see you at Ora?

**A. No sir.**

Q. How long did you stay at your father-in-law's house at Ora, and tell the jury what was your condition?

A. I went there about the 14th of December; I left there just before Christmas; I know I eat Christmas dinner at home.

Q. Tell the jury what was your condition there and what you had to do there?

A. At my my father-in-law's?

**Q. Yes.**

A. I laid there in bed with people to wait on me. I wasn't able to get up.

Q. Tell the jury whether or not your foot had been cut off at that time or not?

**A. No sir.**

**Q. Tell the jury what fix it was in there?**

A. It had all those gashes in there which weren't healed up, and I had to be dressed every day like they did at Hattiesburg for two months.

Q. Why did they have to be dressed?

A. There was all kinds of pus run out of my leg, and it had to be dressed.

Q. How many places?

**A. There was thirteen of those places in leg and foot.**

Q. Tell the jury whether or not you were suffering from that?

**A. Yes sir.**

Q. Where were you there—Did you sit up or lie down most of the time?

A. I sit up part of the time and laid down part of the time.

Q. Tell the jury when you sit up, how you had to keep that limb?

A. I had to keep it elevated in a chair with a couple of

49 pillows in the chair.

**Q. For how long?**

A. I kept it that way until the time they cut it off.

Q. When did you leave your father-in-law's house at Ora? In the first place who waited on you at Ora besides the physicians?

A. One thing I would like to tell you. I told you I kept it there until they cut it off; but when I was standing up I would keep that foot back behind me. I couldn't hang it straight down, but I had to keep it elevated and couldn't hang it down.

Q. Who waited on you and what did they do there

By Mr. BRADY: We object to who had to wait on him.
Overruled.
Defendants excepts.

A. My wife waited on me, and my wife's mother and father waited on me, and people around there was mighty good to come in and help us, and some of them wouldn't have anything to do with it, but most of the waiting was done by my wife and her mother and my wife's father and my sister.

Q. When you left this house where did you go?
A. They toted me home, which is just fifty yards across the alley.
Q. How long did you stay there?
A. Until some time in February.
Q. State to the jury what your condition was there?
A. I was still in the bad there. They were dressing my foot and I was still laying up there.
Q. How — did you stay there?
A. Until February.
Q. Was the Doctor still coming to see you?
A. Yes sir.

Q. Did you have to have any attendant to wait on you?
50 A. Yes sir; somebody had to wait on me all the time. I couldn't do anything for myself; I couldn't get out of bed myself.

Q. You were in that fix until when?
A. Sometime in February.
Q. What effect did that have on your mind? What was your nervous condition at that time?
A. My nervous condition was bad. I don't know about my mind; of course I was worried like anybody would be in that fix. I was there hurt, and I wasn't a man of money, and I didn't know how my money was coming or who it was coming from.

Objection: Incompetent. Overruled. Defendants excepts.

Q. Now, Mr. Pierce, you went from your home in Ora to where?
A. They carried me to Dr. Ramsay's home in Crystal Springs.
Q. Dr. Ramsay is what relation to you?
A. He is my uncle and I stayed *in there* town at a sisters of mine.
Q. What did Dr. Ramsay do to you if anything?

Objection: Incompetent. Overruled. Defendant excepts.

A. Dr. Ramsay treated my foot and did the best he could with it from February, as well — I remember, up to the 29th day of March.
Q. How did he treat it?
A. He dressed it and used first one thing and another on it, trying to get that bad odor and pus out of it.

Q. Tell the jury the condition of your leg at that time?
51 A. It was growing worse all the time it would heal up at one time, and the bone was all dead and fractured——

Objection, because it appears that he was trying to preserve his leg, and trying to keep from losing it, and the testimony is incom-

petent, as the pain he suffered on account of trying to retain it when it was constantly growing worse, is incompetent.

Overruled. Defendants except.

Q. Go ahead and tell what suffering you had to undergo while Dr. Ramsay was working on you at Crystal Springs?

A. He came to examine my foot, and looked at it and says——

Q. Don't tell what he said?

A. My limb—my ankle was broken to pieces, and the bones in the instep; and it would heal up, and break out in another place.

Q. Did those places have to be opened so as to permit the corruption to run out of your leg?

A. No sir, it was never opened after they cut them thirteen places in Hattiesburg; it always bursted after then. This place in the side of my foot, there was a hole nearly through my foot, and it healed a little at a time, and they took a probe and put medicated gauze on it and put it in there, and it absorbed the corruption?

Q. How — did it stay that way?

A. Until they cut my foot off.

Q. When did you leave Dr. Ramsay's?

A. I left there the 8th or 9th of March.

Q. Where did you go?

A. To Jackson to the Baptist Hospital.

Q. How long did you stay there?

52 A. I stayed there.—I don't know whether it was the 8th or 9th but whichever day it was, I stayed there until March 22nd.

Q. Under the supervision and care of who?

A. Dr-. Shands and Hunter.

Q. Do you mean Hattiesburg or Jackson?

A. No sir,—Jackson. Dr-. Shands and Hunter are the men that do the operating at Jackson.

Q. Has Dr. Ramsay made any charge to you?

A. No sir.

Q. Do you know what his charge would be if anything?

A. No sir, I hav-n't been in a position to pay him yet, and he hasn't said anything, and I hav-n't ask- him.

Q. Who did he carry you to at Jackson?

A. Dr. Shands.

Q. What are his initials?

A. H. R. Shands.

Q. And Dr. J. F. Hunter?

A. Yes sir.

Q. They are at Jackson?

A. Yes sir.

Q. What examination did they make of your foot?

A. The day I got there they made an examination of my foot. They made an "X-Ray" examination with two or three doctors.

Q. Do you know what other doctor they had in consultation with them?

A. It was Doctor Wall.

Q. They had four Doctors there together, didn't they?

Objection. Immaterial.
Overruled. Defendant excepts.

53 Q. How many doctors did they have in consultation there with reference to seeing what should be done with your foot?
A. Drs. Shands and Ramsay and Wall made the examination, then they carried me in and made the "X-Ray" examination, and after they made the examination they had Dr. Hunter come in afterwards—Dr. Hunter wasn't in at the time with Dr. Shands and Ramsay, and Dr. Hunter and Dr. Shands also made an examination after they had made the "X-Ray" examination.
Q. Then where did you go?
A. They carried me to the Baptist Hospital.
Q. How many examinations did they make of you there?
A. They made one at Dr. Shands' office—that is two——

By Mr. BRADY: We object to how many examinations they made.
Overruled. Defendant excepts.

A. They examined me in Dr. Shands' office—, then in Doctor Wall's office,—the man that had the "X-Ray," and they examined me there, then they carried me to the hospital.
Q. Did you make one or two trips to Jackson, to ascertain the condition of that limb?
A. Two.
Q. The first trip you consulted who?
A. Drs. Wall and Shands and Hunter and Ramsay.
Q. Who carried you back home?
A. I stayed at home that night and he got me ready and carried me back to the hospital Saturday morning.
Q. What do you mean by getting ready?
A. I got my grip and what little cloths I wanted to carry.
Q. Where did you go then?
A. They carried me to Dr. Shands' office, and he carried me from his office to the Baptist Hospital there.
54 Q. Now state what was done for you?
A. They carried me there and carried me over to the superintendent, Miss Stamps, and told Miss Stamps——
Q. Don't tell that. How long did you stay there before they cut your leg off?
A. From Saturday morning until Monday morning.
Q. Tell what you had to do before they cut your limb off?
A. They gave me a 'through' of medicine the first thing and got me ready for the operation.

Objection. Overruled. Exception.

Q. Now, Mr. Pierce tell whether or not you were still suffering at that time?
A. Yes sir I was still suffering.
Q. And state whether or not the condition of your leg was the same as you have detailed to the jury before?
A. The pain was getting worse and the order was awful, and I could tell from the odor my leg wasn't doing like it ought to do.

Q. When did they perform the operation?
A. On the 11th day of March.
Q. Who did that?
A. Dr. Shands and Hunter.
Q. Do you know what they had to do to amputate the limb—to cut it off?
A. You mean what they had to do before they cut it off?
Q. Yes.
A. First they shaved my leg and washed it two or three times—I reckon they thought they wanted to get it clean.
55 Q. Don't state that. What was the condition of your limb from the crotch down?
A. My whole limb was sore.
Q. How long did it stay that way?
A. A month or so after my limb was cut off.
Q. State whether or not you suffered any from that soreness?
A. Yes, sir, I suffered very much.
Q. What effect, if any, did that have on your mind to know you had to have you- foot cut off?
A. I hated—I put up a fight to save it, and out — a fight for four months and 25 days, and then to think I had to let them cut it off——
Q. They put you under an opiate to cut it off?
A. Yes sir, they gave me, ether.
Q. How long were you on the operating table do you know of your own knowledge?
A. No sir, it was about——
By Mr. BRADY: Don't state unless you know the time.
A. It was between 8 and 9 o'clock when they carried me in the operating room, and I heard the twelve o'clock whistles blow. As quick as I woke up they began giving me hyperdermics, and I didn't know nothing much the rest of that day, they gave me hyperdermics the rest of the day.
Q. How long did you lay there?
A. From the 11th to the 22nd day of March, and I got up two days. They let me come home, but I wasn't well enough to leave the hospital. And they carried me to Dr. Ramsay's house and he cared for me and treated me there in order to make the hospital bill light.
Q. Now, Mr. Pierce, how did you leave the hospital?—They cut the foot off did they?
A. Yes sir.
56 Q. How did you leave the hospital?
A. On crutches.
Q. How did you go?
A. I went to the depot and from there home.
Q. When you got home what did you do?
A. They met me at the train with a surrey and carried me up and put me to bed at Dr. Ramsay's, and I stayed there a week and then went to my sister's and stayed there, and then went to my father's in the country.
Q. What can you do with that limb?

A. Nothing now unless I had an education.
Q. How long did it stay sore?
A. It stayed sore for a month. I have pain now if I bump it against something—Those scars on there are as tender as your eye right now.
Q. What was you- earning capacity at the time you received this injury—was how much?
A. I have made from $75.00 to $140.00 a month.
Q. What was your services reasonably worth at the time you were hurt there, in the profession you were following;—what were they worth in general.

Objection. Overruled. Exception by defendant.

A. If you will allow me to tell you——
Q. Just tell what your earning capacity was at the time you were hurt?
57 A. $100.00 or $125.00 a month is what I usually got. I was working for less at that time. I was making $75.00 at that time, but there was reasons why I was only getting $75.00.
Q. The reasons were your folks were at Ora, was the reason you were staying there?

By Mr. BRADY: Objection and move to exclude that——
By Mr. DENT: I confess that motion.
By the COURT: It is excluded at the request of the plaintiff and the jury will not consider what he said about his labor being worth a $125.00 a month.
Q. Now, Mr. Pierce state to the jury whether or not you have been able to make anything with your leg in that condition now?
A. No sir.
Q. What do you walk with?
A. I walk with crutches.
Q. Have you anything else?
A. I have an old peg leg, and have to keep on hard ground with it. If I get out anywhere I bog down.
Q. How do you fix the peg leg on?
A. I buckle a strap here (indicating leg) and then I have a strap that comes around my waist.
Q. What was your occupation when you were injured?
A. Locomotive engineer.
Q. Are you learned in any other trades or profession except locomotive engineer?
A. That is all. I served my time to learn that, and that is all I know.
Q. What do you mean by serving you- time?
58 A. I served as a fireman. It is owing to how competent a man is to learn, and I served 3 to 4 years as fireman before I got to where I could run an engine.
Q. State to the jury what you have earned since you received this injury?
A. I haven't made a nickle since I have been hurt.
Q. State whether or not you have been able to do anything?

A. No sir, I can't work on my crutches I don't know how to do anything else except what I was doing.

Q. Now, Mr. Pierce, I will ask you to state to the jury, please, if you had a conversation with Mr. Will Tatum, the superintendent of this railroad, immediately after this accident, after you were injured in the collision there?

A. Yes sir.

Q. State to the jury what the conversation was?

By Mr. BRADY: Objection.

By Mr. DENT: Please sustain that objection for the present.

By the COURT: It is sustained at the instance of the plaintiff.

It is admitted by the defendants that the map offered by the plaintiff as Exhibit "A" to the testimony of the plaintiff, is approximately correct, and shows approximately the line of dummy railroad of the defendant.

Q. It has been admitted that this is approximately a correct map of the defendant's Lumber Company's line. Now, gentlemen (addressing the jury), if you will stand up there I will show you about where Ora is.

59 By Mr. BRADY: If the court please, we do not want the attorney to testify, we want Mr. Pierce to testify.

By the Court: Let the witness testify.

Q. This red line (indicating on map) represents the line of the Gulf and Ship Island Railroad, this is the town here. What is the name of that town?

A. Ora.

Q. The main line of the Easterling Lumber Company extends in a northerly direction into what county?

A. Jeff Davis County.

Q. What is this where my finger is pointing?

A. That is the "Y" on the railroad.

Q. State whether or not that is the "Y" where the engine ran into you?

A. Yes sir, that is the "Y" here (indicating).

Q. That is in Section 2 or part of Section 3, where this big "Y" is?

A. Yes sir.

Q. This is what out here?

A. That is where the camps are located and this is the "Y" at the camps. (Indicating.)

Q. As I understand you, you had carried your engine or train from Ora to the Camps here?

By Mr. BRADY: Objection; that is leading, and he has already testified to that.

By Mr. DENT: All right.

Q. Mr. Pierce what is the lay of the ground where this wreck occurred?

A. It is a very steep incline there, it is considerably up hill where the wreck occurred, and a very stiff curve.

60 Q. Who was running down hill, and who was running up hill?

A. The Shay engine was running down hill and I was running up hill.

Q. Now, before you began to run up hill, what was the lay of the track?

A. It was down hill just before I began to go up hill, as it was the other way. It was down hill and right up, and I had just gone down hill and started up the incline of the other hill, and was about one third way up the hill when the wreck occurred.

Q. Was it light or dark?

By Mr. BRADY: Objection: They make no allegation *if* their declaration about defective light.

By the COURT: Overruled—he has a right to tell what time of day it was.

Defendant excepts.

A. It was just about daylight in the morning; it was a very heavy fog and dark, you couldn't see any thing hardly, it was a very heavy fog that morning, and it was hard to see any distance ahead.

Objection. Overruled. Exception.

Q. Tell whether or not those engines were lighted up and had head lights on it?

Objection.

Sustained; there is nothing of that kind in the declaration, and let that be excluded as to no lights being on the engine.

61 Plaintiff excepts.

By Mr. DENT: We might show the conditions thoroughly, without charging negligence.

By tht COURT: No sir I think not. I will exclude that.

Plaintiff excepts.

Q. Mr. Pierce, what if anything, did the Easterling Lumber Company or the defendants have to do with your going to the hospital at Jackson? State whether or not they sent you there?

A. They sent me there, I suppose—I told——

Q. At Jackson?

A. Oh, no sir; they didn't send me to Jackson. I thought you were talking about the first hospital I went to. They didn't have anything to do with sending me to Jackson.

Q. Who paid your expenses there?

A. I paid it.

By Mr. BRADY: Objection.

By the COURT: I would think the expense he was put to they would be liable for that.

Exception by defendant.

Q. Who paid your expenses?

A. I paid them.

Q. Tell the jury what your expenses were?

A. I paid Dr. Shands and Hunter $75.00 for cutting my limb off,

and $5.00 for the "X-Ray" examination; I paid them $80.00, and I paid the Baptist Hospital $53 hospital bill.

Q. What other expenses, if any, were you to there at the time on account of your injury?

A. I was out my railroad fare a couple of trips up there and back, and some few other little things I had to have that I
62 would not have had to had if I hadn't been there; it was $3 or $4 the itemized account was; the $80.00 and $53.00 check I gave to the hospital, and the Doctor's account, and two or three trips up there, which would be about $3.00 railroad fare.

Cross-examination.

By Mr. BRADY:

Q. Mr. Pierce, how old were you when you first commenced to fire on an engine?

A. When I left the farm I was 16 years old, and went to working in a shop—in a round-house, to wipe engines.

Q. I didn't ask you that. I asked you how old you were when you commenced to firing an engine?

A. I will have to figure back. I am 29 years old, and I stated yesterday I had been running an engine some 8 or 10 years, and I was 16 years old when I first started in the shop, and that is where I started, in the round-house when I was 16 to wiping engines; and they put a man on the road when a vacancy occurs.

Q. What company did you first work for?

A. The Keystone Lumber Company.

Q. That is the first company you ever worked for?

A. Yes sir.

Q. Over in Lincoln County?

A. Yes sir.

Q. And you worked in the shops first?

A. Yes sir.

Q. How did you work in the shops?

A. I worked in the shops and firing extra, on the engine, and wiping up, before I taken a regular job, for six months, and then I fired regular.

Q. How long did you fire?

A. Six or eight months, and then they put me to running an engine.

63 Q. How long did you run an engine?

A. 8 months.

Q. Then where did you go?

A. To the Liberty White Railroad Company at McComb City.

Q. What did you do there?

A. Fired an engine some and run some.

Q. How long did you fire and run with the Liberty White?

A. I stayed there altogether 12 or 15 months; I don't know exactly.

Q. You fired for the Keystone and worked for the Keystone, and ran an engine for the Keystone altogether how long?

A. I haven't figured it up. I just told you I worked there in the shop—fired on the engine and extra some 4 or 5 months, as I stated just now.

Q. What was the total length of time you worked for the Keystone Lumber Company?

A. I don't know how long I did work there, Mr. Brady.

Q. About how long?

A. Something between a year and two years. I was there a couple of times I don't know exactly how long.

Q. The first time you were there?

A. I stayed there five months.

Q. Then you went to Liberty White?

A. No sir, I went back to the Keystone Lumber Co. a second time.

Q. How long did you work the second time?

A. I don't know. I went there in July, and I don't know when that mill quit there. I worked up until near the time they cut out, and then went to the Liberty White, some 6 or 8 months.

Q. About how long?

A. It has been 12 or 14 years ago.

Q. How long did you work for the Liberty White?

A. 12 or 15 months.

Q. What did you do there?

64 —. Fired and run engine there.

Q. Then where did you go?

A. From there to the Gulf and Ship Island.

Q. How long did you stay with the Gulf and Ship Island?

A. I didn't stay there but a few days.

Q. What did you do there?

A. I fired and run an engine extra at Hattiesburg.

Q. Then where did you go?

A. I came back to Ora and worked for these people at Ora.

Q. How long did you work there?

A. From January until August.

Q. 6 months or seven months?

A. I went to work the 17th of January, until August.

Q. Where did you go then?

A. I worked until September.

Q. I thought you said you worked until August?

A. I came back there in September to go to work, but I went to work for Mr. Shelby.

Q. How long did you work for Mr. Shelby.

A. Just a few days.

Q. Where did you go then?

A. I went to Mish to work on the Shay.

Q. How long?

A. Just a few days.

Q. Where did you go then?

A. To work for Colonel Wood.

Q. How long did you work there?

A. Three years.

Q. Then where did you go?
A. I went to Louisiana.
Q. Where did you work there?
A. I worked for the Tioga and Southeastern Ry. Co.
65 Q. What did you do?
A. I worked in the shop and——
Q. How long did you work in the shop?
A. I was there two years off and on; I was there the second time. When I first went there I ran an engine for four months, and then I worked in the shop, except I did extra running.
Q. How long did you work in the shop the first time?
A. I don't know because I would work in the shop three or four days and then run an engine three or four days.
Q. What did you do in the shop?
A. I was working, repairing engines.
Q. You know how to repair and engine then?
A. Yes sir.
Q. Estimate the time you worked the first time you were there in Louisiana with this company?
A. I went there in December and left there in March.
Q. That was three or four months then?
A. Something like that.
Q. Then where did you go?
A. I came up here to Ora, and didn't do anything then. I wasn't working in the railroad department then.
Q. What did you do there?
A. I started to farm up there and saw I wasn't going to make nothing, and went back to public work.
Q. How long did you spend trying to farm?
A. I don't know whether it was June or July I went back there.
Q. How long did you stay there at Ora?
A. I went there in March and I told you I didn't know whether it was June or July when I left there.
Q. Three or four months then you were up there trying to farm; is that right?
A. I don't know — many months it was. It was March, and about June or July when I left there.
66 Q. Who were you farming with?
A. Mr. Williams; we had a little place rented up there.
Q. That is your fa*ht*er-in-law?
A. Yes sir.
Q. Then where did you go from there?
A. I went back to Louisiana.
Q. What company?
A. For the same company I was working for.
Q. What is its name?
A. The Tioga and Southeastern Ry. Co.
Q. What did you do then?
A. I did the same thing as I did first; run and engine and worked in the shops.
Q. How long did you stay there?

A. If it was June or July when I went back—I don'- remember, but I stayed there until February.

Q. That was about six months you stayed there—from July to February?

A. Yes sir.

Q. Then where did you go?

A. I came back over here then, didn't work any until I left there from February up until—I don't know whether it was April or May.

Q. Where were you during those months?

A. I was at Ora.

Q. Who with?

A. Staying there with my wife's father.

Q. And doing nothing?

A. I wasn't doing anything—no sir.

Q. Then where did you go?

A. I went to Bogalusa to the Great Southern Lumber Co.

67 Q. How long did you stay there?

A. Three or four weeks.

Q. What did you do there?

A. Run an engine.

Q. Then where did you go?

A. I came back to Ora.

Q. When?

A. In May.

Q. What did you do?

A. Run an engine.

Q. How long?

A. From the time I went to work here until I got hurt in October.

Q. From May until October?

A. Yes sir.

Q. That is about five months, isn't it?

A. You can figure it up; it was from the 19th of May I think until October.

Q. That is about 5 months. That is all the work you did from the time you began until the time you were injured? You have told every place you worked at?

A. I worked a little for the Mississippi Central the time I was at Hattiesburg.

Q. How long did you work there?

A. Just a few days. I didn't stay there a month.

Q. A week?

A. I don't know exactly how long.

Q. Is there any other company you worked for?

A. No sir.

Q. You have stated the companies you worked for and the places you worked at, have you, from the time you went to work for Companies until you got injured?

68 A. Yes sir.

Q. How long was it after you were injured until your foot was amputated?

A. It was from the 16th day of October until the 11th day of March—You can figure it up.

Q. 1st day of October, when?

A. 1911. And it was amputated on the 11th day of March, 1912.

D. During that time after you left the hospital in Hattiesburg, you used crutches when you were in Ora, didn't you?

A. I didn't understand that.

Q. After you left the hospital at Hattiesburg and while you were in Ora you used crutches, didn't you?

A. After I got able to go around I did. Sometime after I came back from the hospital I didn't use any at all:—I wasn't able to go.

Q. How long was it after you left the hospital and went to Ora, was it, before you commenced to walk around on your crutches?

A. I don't know that either. I left there I think on the 14th day of December, and at Christmas I was sitting up in a rocking chair, and sometime in January,—about Christmas of January I got crutches and I walked around the house with them, and I kept taking a little more exercise each day.

Q. And you walked around in town too, didn't you?

A. Along the last of January and the First of February I did.

Q. In January you were down here in the Court House?

A. In October.

Q. Wer-n't you?

A. In October.

Q. When was it you were in the court house on crutches,—before you had your foot amputated?

A. Did you have reference to last January Court?

Q. You were on crutches?

A. No sir I was toted here and brought here in a surrey and toted up here and taken back to bed.

69 Q. In January you commenced to use crutches?

A. Yes sir.

Q. When was it you went to Crystal Springs?

A. In February.

Q. You went there on crutches?

A. Yes sir.

Q. You went there, at your father's?

A. Yes sir.

Q. Dr. Ramsay is related to you?

A. Dr. Ramsay's wife is my aunt.

Q. You staved with your father some time?

A. I staved with my sister in town, and after they cut my foot off I was able to go to my father's I went out there and staved a while.

Q. When was it you said you went to work for the Easterling Lumber Company this last time?

A. Sometime in May of last year. I think it was about the middle or 20th of May.

Q. John Tatum, one of the defendants in this case worked for that company then, I believe you stated?

A. Yes sir.

Q. Mr. Will Tatum was also at work for the company?

A. Yes sir.

Q. What was the first sort of work you did for the Easterling Lumber Co. when you went to work for it the last time?
A. I ran a Shay engine.
Q. In the woods?
A. Yes sir.
Q. Both of the Mr. Tatums were then at work for the Lumber Co.?
A. Yes sir.
Q. How long did you run the Shay engine?
A. Six or seven weeks. They took me off of that and put me on another engine.

70 Q. Which engine did you go on after you left the Shay?
A. On the engine 6—the one I was hurt on.
Q. Who ran the Shay before you worked on the Shay?
A. Mr. Jim Tolan was there before I went there.
Q. Who took the Shay after you left it?
A. I believe as well as I remember, Mr. Jim Burnham:—I am not sure about that. They had two or three different men there, but I think it was Mr. Burnham.
Q. Who ran engine No. 6.—or the one you were injured on, before you took it?
A. Mr. McLendon.
Q. Who fired your shay at the time you ran the shay?
A. Mr. Warren.
Q. Who fired the 6 spot:—Trian No. 6? Who fired engine No. 6 before you commenced to run it?
A. Mr. McLendon's brother fired some and they had a negro that fired some. There was some negroes that fired extra, and Mr. McLendon's brother fired some.
Q. You stated to Mr. Dent on your direct examination that Tatum knew your train had the right of way over this switch?
A. That is the order he gave me, that my train had the right of way over the track.
Q. I am talking about Tatum that was firing.—You said he knew your train had the right of way? You told Mr. Dent that, didn't you?
A. A man working there like he is and running an engine that way know- the rules, the way they operate those trains.
Q. This was a standing rule then?
A. I don't know what kind of rule they had about the Shay. All I know was the rule they had for running my engine.

71 Q. Then you don't know that Mr. Tatum, the one that was firing that engine, knew which train had the right of way?
A. I don't know what kind of orders he had for the right of way.
Q. Didn't you state to Mr. Dent yesterday that he had worked there long enough to know the rules of the company, and that he knew your train had the right of way?
A. He has worked there seven or eight years and fired on the engine, and if he didn't know it in that time, I don't know when — would ever know it.
Q. And you have had the right of way?
A. Yes sir, I had it right along.

Q. No 6 had the right of way over this "Y" all the time?
A. Yes sir.
Q. Had it on Monday morning?
A. That is on the morning run,—hauling those men, taking them to their work and bringing them in in the evening; every night and morning they had the right of way.
Q. Train No. 6 every time you ran it had the right of way from the "Y" on to the camps?
A. Yes sir.
Q. You are sure about that?
A. Yes sir.
Q. They had it every Monday morning?
A. Yes sir.
Q. It carried the men out there Monday morning, didn't it?
A. Yes sir.
Q. What did these men do that it carried out?
A. Some sawed logs, and negroes worked on the section, and Mr. Tatum was Superintendent and he went out.
Q. Did the log sawyers go out on that train?
A. Some of them did, going backward and forward; some of them lived in the camps and some in town.
72 Q. Don't you know as a matter of fact the log sawyers did not go out to the camp except in rare instances?
A. I have carried them out there a number of times.
Q. Where did these log sawyers live?
A. One of them lived in Ora.
Q. Who did you carry?
A. Mr. Dave Nall.
Q. That is two?
A. Old Harry Middling that sawed logs went back and forth all the time.
Q. That is three men?
A. There is a whole bunch of negroes.
Q. Do you know a bunch of negroes that sawed logs regularly and went back and forth?
A. When ever they worked they did.
Q. How many engines did this company have in all?
A. Three engines.
Q. Now Mr. Pierce while you were running the Shay, the 6 spot had the right of way over the Shay on that run?
A. Yes sir, on the morning and evening run.
Q. I am talking especially about the Monday morning run, that engine No. 6 had the right of way?
A. Yes sir.
Q. You come in home every night, didn't you?
A. Yes sir.
Q. That was your rules?
A. Yes sir, I lived in town.
Q. You came in on the 6-spot didn't you?
A. Yes sir.
Q. And you went out on the 6-spot:—on the train I call the 6-

spot, is engine No. 6. You went out on that every morning didn't you?

A. Yes sir.

73 Q. Don't you know as a matter of fact that it was your rule and custom on Monday morning to have your fireman come down to the "Y" and pick up the empties, and don't you know you rode in on 6, and the 6 always stopped there and you transferred and run your Shay in with the empties from the "Y"?

A. No sir.

Q. You dispute that?

A. Yes sir, I never saw the Shay there Monday morning or any other morning. I have seen it up in the day, but never saw it there in the morning?

Q. I am not asking you about up in the day. Don't you know it was your custom to get off that engine No. 6 when you were running the Shay, and don't you know you transferred and rode the Shay engine with the empties into the Camp? Don't you know you did that?

A. Let me ask you one question?

Q. No sir.

A. No sir, I never got off the 6 at the "Y" and took my engine no morning.

Q. In your life?

A. No sir.

Q. Don't you know it was the standing order of Mr. Reimers and the standing order of Mr. Tatum—communocated therough Mr. Tatum to the men, that this Shay had the right of way every Monday morning over the "Y"?

A. No sir, I never had any orders to that effect. I never had any orders from Mr. Reimer- in my life.

Q. I didn't ask you if you didn't get it from Mr. Reimers, but didn't you get it through Mr. Tatum, from Mr. Reimers?

A. No sir, Mr. Tatum never gave me any order like that in his life.

Q. And isn't it a fact that on every Monday morning the empty cars were left on the "Y" and left on the end of the "Y" next to Ora?

74 A. No sir, I never saw them there before, and I didn't see them that morning, until after I was hurt.

Q. You never did see them there before?

A. No sir.

Q. Don't you know that Mr. Reimers and Mr. Tatum both gave an order that these empties were to be left there, and were not to be carried back on Saturday night for the reason that there was a chance for the men in handling that train late at night, after leaving Ora and doing the repair work, to be injured while handling that train of empties, and don't you know for that reason Mr. Reimers gave the order, and Mr. Tatum carried it out by further ordering the men to always leave the empties at the "Y" and let them be picked up by the Shay on Monday morning?

A. No sir, I never heard any such order given—I never had any such orders.

Q. Did you ever bring the Shay down on Monday morning and get the empties there while you were running the Shay?
A. Bring it down to the "Y"?
Q. Yes?
A. No sir.
Q. Did you ever have your fireman bring the Shay engine down to the "Y" and get the empties on Monday morning?
A. No sir.
Q. Did you ever leave orders with your fireman to come down and get these empties on Monday morning?
A. No sir, there was no empties left there.
Q. Did you ever see any empties there except on this morning you were injured?
A. No sir, I never saw any empties there.
Q. Did you ever leave Engine No. 6 and get over on the Shay engine, while your engine No. 6 stayed at the "Y," and carry the emptoes to the camp?
75 A. Please ask that question again.
Q. (Here the stenographer repeated the question.)
A. No sir.
Q. Did you ever leave while Mr. McLendon was running engine No. 6 and while you were going out to the camps,—leave engine No. 6, and take the Shay engine on Monday morning with a load of empties into the camp?
A. No sir.
Q. And never ordered your fireman to do that on Monday morning?
A. No sir, I never had my fireman carry an empty away from there on Monday morning.
Q. You said yesterday afternoon you pushed Mrs. Perkins up in the coal chute, did you not?
A. I guess that is what you call it: it was where the wood stays.
Q. You pushed her back in the tender?
A. Yes sir.
Q. Mr. Perkins was in the engine wasn't he?
A. Yes sir.
Q. Mrs. Perkins was on the fireman's side wasn't she?
A. Yes sir.
Q. And Mr. Perkins was also on that side wasn't he?
A. No sir, he was standing behind her.
Q. Don't you know as a matter of fact, that Mr. Perkins threw his arm around his wife and helped his wife, and after the wreck his arm was around her, and don't you know after the wreck his arm was still around her?
A. No sir.
Q. You don't know that?
A. No sir.
Q. How long was it, did you state, before you—after you commenced to work in the machine shop—how long was it before you commenced to run an engine?
76 A. Between two and three years before I had a regular job running an engine.

Q. I mean extra running. You said you commenced doing extra running——

A. It was after the third year.

Q. Didn't you state that you run an engine for the Keystone Lumber Company?

A. Not a regular job. I would run it around the shop and coal up and get wood.

Q. Didn't you state that you ran an engine for the Keystone Lumber Company, that you fired a hole and then run an engine?

A. Yes sir, I ran an engine some for them.

Q. How long after you commenced to work for them and fire for them before you commenced to run their engine?

A. I don't know; that has been so long ago, I can't remember anything like that.

Q. Didn't you state to Mr. Dent and me too you worked there, the first time five months, and the second time 7 months?

A. Something like that, I told you I didn't know the exact time.

Q. Now you stated you went to work there in the shops, didn't you?

A. That was the time I was working in the shops and firing, and wiping engines and running them.

Q. Then you stated you ran an engine for the Keystone Lumber Company?

A. Yes sir, as I told you just now,—extra——

Q. How long had you been in the shop before you commenced running this extra engine?

A. I had been in there sometime before they would let me run it around the mill, getting cars out to go to the woods, and switching around the yards.

77 Q. You were picking up cars and that sort of work?

A. Yes sir.

Q. And then you actually ran that Engine into Bogue Chitto, didn't you?

A. Into Bogue Chitto?

Q. Yes sir?

A. I ran an engine one or two trips to Bogue Chitto.

Q. How long had you been firing and working in the machine shops before you did that?

A. I don't know.

Q. About how long?—You stated 7 months didn't you?

A. I stated I worked there 5 months and 7 months.

Q. You did all of that within seven months?

A. Right about that.

Q. That is what you did within the twelve months' time?

A. Yes sir.

Q. Do you think you are an exceedingly bright man in an engineering way?

A. I have held some mighty good — at it, and always got jobs.

Q. But other people are as competent to do that as you are?

A. Yes sir, lots of people don't know it all, but I consider I can run an engine.

Q. What did you state John Tatum was doing at the time before this accident?

A. When I was running the shay there he would top load and tongue logs at the loader and pump water for the engine and fire on the engine, and do anything they told him.

Q. How long had he been firing on the engine?

A. I don't know, he had been there 7 or 8 years, but I don't know what all he was doing.

Q. Were you competent to run the Keystone Lumber
78 Company's engine when you had been there twelve months?

A. No sir.

Q. You were not competent?

A. No sir.

Q. It is a custom is it not, for a man who has had twelve months' experience, to let them commence to handle the engine in switching and handling cars?

A. Some people will do that, but it is not a customary thing.

Q. Then they let you do something that you were incompetent to do and wasn't customary to do?

A. It was just up to them to let me do it, and I didn't have no more sense than to do it, and I would run it every time they would let me, as I wanted to get up there and fool with it.

Q. Do you know how long John Tatum run the engine?

A. No sir that was the second time I ever saw John Tatum run an engine?

Q. Do you know of your own knowledge how long he had run an engine?

A. No sir, I don't know.

Q. If you don't know how long and what his experience was, how can you tell the jury Mr. Pierce, that he was absolutely incompetent?

A. Because he had been there at Ora for the last 7 or 8 years, but hadn't had a job running the engine, and that was the only job, except during the panic he had a job there loading logs, etc., but he wasn't working on the engine.

Q. Weere you there all the time?

A. No, sir. There wasn't any 6 or 8 months at a time but what I was back there, and he wasn't running an engine then.

Q. You just stayed there around Ora to watch John Tatum?

A. No sir, I wasn't watching him or nobody.

Q. What was John Tatum doing while you were working for Col. Wood?

A. He might have worked up there during the panic.

79 Q. Has he been there 7 years right along?

A. He has been here seven years last January, and he has been in there and out of there.

Q. How much of his time has he been out of there, do you know?

A. No sir.

Q. Do you know what he did while away from there?

A. No sir, he went up there to Morton and stayed awhile.

Q. Was he running an engine up there?

A. I don't know.

Q. You stated to the jury he was absolutely incompetent, and if you haven't been watching him how could you know,—and will you stick to that?

A. Yes sir, I have been watching him. He wasn't gone but a month to Morton and I know he couldn't learn to run an engine then.

Q. How long did you stay at Collins?

A. I went away in December and came back in February.

Q. That was a period of four or five months; what was John Tatum doing at that time?

A. He was at Ora, I know he wasn't running an engine.

Q. How do you know he wasn't running an engine?

A. Because the other engineers had jobs running an engine.

Q. You kept up with who ran the engines?

A. It is natural for a railroad bunch to flock together just like lawyers do. I didn't watch for him running the engine, but I didn't see him.

Q. Will you swear he didn't run an engine or have regular charge of an engine in the last seven years?

A. I never saw him running it.

Q. That is not the question—Will you swear he hadn't had regular charge of an engine, and didn't have regular charge of it, in the last seven years?

A. I will swear that he didn't have a regular job of running an engine in seven years.

80 Q. Will you swear he wasn't an extra engineer during that time?

A. He was an extra when he ran into me and hurt me.

Q. I am talking about an extra for six or seven years?

A. I don't know whether he was or not.

Q. Did you ever examine him to know what he knew about an engine?

A. No, sir.

Q. Did you ever see him run an engine except once before this?

A. Just once before he ran into me.

Q. Where was he then?

A. He ran engine No. 6 over the line out to the camps.

Q. Did he stop at the "Y"?

A. I was at the camps when he got there. He stopped at the "Y" at the camps.

Q. I am talking about the "Y" where the accident was?

A. No sir, I don't know about that.

Q. Do you know of your own knowledge, whether he had any trouble coming over the road?

A. I heard Mr. Will——

Q. Don't tell that—You don't know of your own knowledge whether he had trouble getting over the road?

A. No sir.

Q. And never have seen or examined him on an engine, you can still swear that he was an incompetent engineer?

A. Yes sir, I have known him long enough to know he is an incompetent engineer.

Q. How fast was he running that day, do you know?

A. I don't know I would have to guess at that.

Q. Don't guess at it how fast can a shay engine run?

A. The people that makes them reccom-ends about 15 or 18 miles an hour.

Q. That is the limit, isn't it?

A. I have seen them run 30 miles an hour, and you would too if you got in the place I have been in sometimes.

81 Q. I am talking about an average run?

A. I will tell you about an average a shay ought to run, if that is what you are getting at. Some run them 7 miles and some 20.

Q. What is the ordinary time for a shay engine to run?

A. The people that makes them say they ought to run 15 to 18 miles an hour.

By Mr. DENT: Don't state that—State on your own knowledge.

A. I don't know.

Q. You had just gone down an incline?

A. Yes sir.

Q. And you went down that very rapidly didn't you?

A. Yes sir.

Q. How fast did you run down?

A. I don't know.

Q. What is you- estimate of it?

A. Some 12 or 15 miles an hour down the incline.

Q. Didn't you have all the steam working going up the incline?

A. No sir.

Q. Weren't you runnigu 20 Miles an hour at the time of this accident?

A. I was running as fast as I was going down the incline.

Q. Weren't you running 15 miles an hour just before you struck, and when you saw the other engine?

A. I was running 12 or 15 miles an hour going down the incline and I wasn't running as fast going up the hill.

Q. Was there a public crossing just before you got to this part of it?

A. No sir there is one a half or ¾ miles from it.

Q. Between a half and ¾ mile from it?

A. Yes sir, something like that.

82 Q. The rules require for you to blow for that crossing, don't they?

—, ——.

Q. Didn't you have instructions to blow for that public crossing?

A. No sir; I blew for it that morning, but I didn't have instructions to.

Q. You swear you did blow?

A. Yes sir, I blowed for that crossing that morning.

Q. You remember distinctly doing that?

A. Yes sir. There is no whistling boards there you can't tell where to blow and where not to for you are running in the dark.

Q. You could see the public road crossing couldn't you?
A. You could see it after you got on it, but you couldn't see far enough ahead to blow to give anybody signals.
Q. You blowed for it, didn't you?
A. I blowed when I got right to it.
Q. How far were you from it?
A. I was as far as from here *as* to that banister there. (Stenographer estimates 30 feet).
Q. What did you have?
A. I had one car coupled behind the tank.
Q. The men were on this car?
A. Yes sir.
Q. You said yesterday you saw this shay 30 or 40 yards ahead of you?
A. Something like that.
Q. In what distance can you stop this engine you were running?
A. You can't—I don't know the exact distance you can stop it in. There is some very poor brakes on it.
Q. You had charge of it, didn't you?
A. Yes sir.
Q. What distance can you stop it in?
A. I don't know. That depends on the places you are in, the kind of load you have and everything.
83 Q. I am talking about what distance could you stop it with this one car?
A. I don't know.
Q. Did you ever try it?
A. No sir, I never got in that kind of a place before.
Q. You didn't give the jury any idea what distance you could stop that engine in with one car attached to it?
A. That depends on the speed, the condition of the track, etc.
Q. What distance could you stop it in going up a hill at 10 miles an hour, with one car *at* attached to it?
A. Some 50 or 60 yards. I don't know exactly. I never have tried to stop them on an occasion like that. A man who knows when he has to make a stop pulls up slow and gets ready to make the stop.
Q. What distance could you stop it in by reversing the lever and doing all you could to stop it?
A. I don't know I never tried it.
Q. You had just taken that engine out of the shop, hadn't you?
A. Some two or three or four weeks,—something like that.
Q. You repaired it yourself in the shops, didn't you?
A. I helped repair it. They had a shop foreman there that had charge of the work, and I was doing what work they told me to do. I was an engineer and was supposed to run.
Q. Did you work on this engine yourself?
A. Yes sir.
Q. You still have the ability to work on an engine, haven't you?
A. I don't know.

Q. Isn't it a fact that during the time you worked for Col. Woods, you were very sick and thought you were going to die?

A. I was sick part of the time.

Q. Isn't it a fact that you were sick all of the time?

A. No sir.

84 Q. How long were you sick?

A. I don't know I held my job right on.

Q. Didn't Col. Wood release you from your position and take care of you while you were sick for a long time?

A. Col. Wood told*d* me——

Q. I never asked you what he told you.

A. He did not take care of Me. My time went on and I was around the mill.

Q. How long were you in the bed?

A. I don't know.

Q. About how long?

A. I don't know about how long.

Q. You can't give the jury an idea?

A. Dr. Ramsay can tell you more about that than I can, he treated me.

Q. I don't want to know what Dr. Ramsay will tell—Can't you tell us?

A. I wasn't in bed, all told, over a month, but I was in bed a few days and then up, and then in bed—I reckon it might have been a month altogether, but I had my job right along while I was there.

Q. The total amount of your time you lost while you were working for Col. Wood during your illness was a month?

A. I didn't lose any time at all.

Q. I mean the total time you didn't work while you were on Col. Woods' job, didn't amount to over a month?

A. About that.

Q. Do you know Mr. Lofton, in the employment of the Easterling Lumber Company?

A. Which one do you have reference to.

Q. Will Lofton?

A. Yes sir.

85 Q. Was he at work for the Easterling Lumber Company at this time?

A. At the time I got hurt?

Q. Yes sir?

A. Yes sir.

Q. What was he doing?

A. He was hostlering at the camps, taking care of the Shay engine at night.

Q. Did he do any other work there?

A. He would work the loader extra and fire some, but his regular job was hostlering at night.

Q. And fire sometimes?

A. I said he fired extra in the men's place. He might work all night and all day, but his job was hostlering.

Q. He hostlered and top-loaded and fired?
A. I never saw him top-load. I seen him run the loader.
Q. Your general health now is as good as it ever was, isn't it? Mr. Pierce.
A. No sir.
Q. It is not?
A. No sir.
Q. Mr. Lofton is a one-legged man isn't he?
A. Yes sir.
Q. When you ran the Shay out there what did you do?
A. I handeled cars at the loader and brought these cars out to the camps.
Q. When did you bring the loads out to the camps?
A. When we would get them loaded at the loader.
Q. Where did you deliver them?
A. To the men on the middle haul at the camps.
Q. That was engine No. 4?
A. Engine No. 6.

Q. The same engine you were on?
86 A. The same engine I ran after I run the Shay.
Q. Did four haul the logs?

A. The four hauled the logs from the "Y" to the mill, and 6 would haul them on about days in the week, and the rest of the week 6 would lay steel, etc.
Q. And the Shay never come down to the "Y" at all?
A. It would come there the days 6 would take up steel, but that would be understood, and it would come to the "Y" one trip, and they would run the main line engine back past this switch at the water melon (?) switch.
Q. When engine No. 6 was laying steel or doing other work, you would bring logs down to this "Y"?
A. Brought them to the water melon patch.
Q. Never brought them to the "Y"?
A. I have brought them to the "Y" do-ing the day.
Q. What became of those empties on Saturday evening?
A. They were carried to the camps.
Q. Who carried them back there?
A. The shay engine.
Q. What engine delivered the empties to the "Y"?
A. From the mill to the "Y"?
Q. Yes.
A. Engine No. 4 the main line engine carried them from the mill to the "Y".
Q. Then what engine took them from the "Y" into the camps?
A. When I was on the middle haul, he would come from the camps to the "Y" every morning and bring this train of logs with him; he would give this train of logs to the main line engine and take up the empties and carry them back to the camps and deliver them at the camps.

87 Q. On Saturday evening all logs loaded would be carried into the mill, wouldn't they?

A. On Saturday evening?
Q. Yes?
A. No sir, sometime they would be loaded Saturday evening and left in the woods. I was only on that run 6 or 7 weeks.
Q. That never occurred while you were there, did it?
A. Yes sir.
Q. But that was unusual wasn't it?
A. They generally loaded the trains and sent them to the mill, and the last trip in the evening when they went to the "Y" with the loads, they would carry them back to the camps.
Q. It was unusual for logs to be left in the woods Saturday night?
A. If they didn't get the whole train loaded out they would leave them in the woods.
Q. That was unusual, wasn't it?
A. I don't know because I hadn't been there long enough to know about that.
Q. These empty cars that were carried in on Saturday night.—were any empties left on the "Y" Saturday evening?
A. I never seen any left there?
Q. Did you ever see a*by* empties left on this "Y"?
A. With no engine hooked to them?
Q. Yes?
A. No sir, I never saw any cars there unless there was an engine to handle them.
Q. How did they get the empties from the "Y" to the camp?
A. This engine 6 would carry them from there.
Q. When?
A. When it come there in the morning with the logs it would go back with them after the main line engine got out there.
Q. When was the first load of logs carried to the mill on
88 Saturday? about what time of day?
A. That would depend whether they would get unloaded at the mill. Sometimes they would get in there Friday night at the mill and unload on Saturday morning.
Q. How many trains of logs did they load in the woods on Saturday?
A. As usual they would load four trains.
Q. Then there would be four trips in from the "Y" where this accident occurred, to Ora?
A. Yes sir.
Q. It was customary, or at least it was frequent to bring the Shay and to wash *o*t out, wasn't it?
A. They would bring it in some Saturday nights and some Saturday nights they would leave it in the woods. They didn't wash it every Saturday night.
Q. What time of day was those empties delivered to the "Y"?
A. From the Mill?
Q. Yes sir.
A. Seven or eight o'clock. He didn't leave the mill until 6

o'clock in the morning, and then had 12 or 15 miles to run out there and it would be 7 or 8 o'clock, or maybe 8:30.

Q. Were empties ever carried to the "Y" Saturday evening?

A. And left there?

Q. Yes? Carried out to the "Y" to be delivered to some train to take to the camps?

A. Whenever they go back on the last train Saturday evening, after the last train of logs, they carry them to the "Y."

Q. Then the last train that went out Saturday afternoon would carry empties to the "Y."

A. Yes sir.

Q. When would they be carried back to the camps?

A. This engine that carried the empties would carry them on back to the camps.

89 Q. It would take these empties back to the camp?

A. Yes sir.

Q. Suppose the engine was coming to be washed out, what would be done?

A. You mean the Shay coming in to be washed out?

Q. Yes, or the other engine? You said they did come in on Saturday evening?

A. It would take the empties back to the camps and pick up the men and come in.

Q. That was always done on Saturday evening?

A. Yes sir, while I ran there. I don't know what they did since.

Q. Did you stop at the "Y" when you were running engine 6?

A. I stopped at the west end.

Q. That is nearest to Ora?

A. No sir, nearest to the Camp.

Q. You never stopped at the end nearest to Ora?

A. Do you mean any time in the day.

Q. No, Monday mornings?

A. No, sir there is nobody to get on, and there is no stop there.

A. That is all.

Redirect examination.

By Mr. DENT:

Q. State whether or not the Shay engine spent practically all the time at the camp?

A. Yes sir. It stays there every night unless something breaks about it and they bring it in to fix it. The engineer lives at the camps, and he takes the engine out with him when he goes out Saturday night.

Q. State whether orders were given you to run No. 6 out from the mill to the camps the first Monday morning, to carry passengers?

A. Yes sir.

90 Q. Do you know whether or not the Shay engine would leave the camps before your engine got there, and come out and get the empties on the "Y" if they were there? Do you know that of your own knowledge?

By Mr. BRADY: We object, because he went into that fully on the direct examination.

By the COURT: Let him ask it again.

Q. Do you know what the regulation was with reference to the Shay engine on Monday morning coming out and getting cars before your engine got there?

A. No sir, I don't know what they done before I got there Monday morning. When I would get there on the "Y" there would be no engine or cars there.

Q. State whether or not you have been given notice of *any* change of any schedules on that line, or whether there had been any change in running those trains, that you were to leave Ora 30 minutes earlier than when you got there?

By Mr. BRADY: We object, because there is no intimation there was any change in the schedule.

A. I hadn't had any order only the orders he gave me to leave at 5 o'clock, and I didn't have any information whether any other *d*chedules had changed or not.

Q. You don't know anything about whether the people at the Camp were given any notice that this change had been made—A change of thirty minutes had been made in the schedule of your train?

A. No sir, I don't know what notice had been given them at all out there.

Q. You say Mr. Lofton was a one-legged man up there?

A. Yes sir.

Q. Do you know if he lost his leg there with the Easterling Lumber Company?

91 By Mr. BRADY: We object — incompetent.
Sustained

By Mr. DENT: Go ahead, I don't care for him to answer it.

Recross-examination.

(By Mr. BRADY:)

Q. You stated yesterday afternoon he told you he wanted you to leave at this time, if you left every man except the fireman, didn't he?

A. Yes sir.

Q. He wasn't caring anything about getting those men out that you spoke about, was he?

A. I don't know what reference he had to them, but he said the engine had been getting the men to the woods late, and he gave me orders ten days before that and says "you leave the Mill at 5 o'clock, if you leave every man," and I commenced to getting up earlier, and left Ora at 5 o'clock.

Dr. H. R. SHANDS (white), being called as a witness — the plaintiff, after being duly sworn testified as follows:

Direct examination.

By Mr. DENT:

Q. What is your name?
A. H. R. Shands.
Q. Where do you live, Doctor?
A. I live in Jackson.
Q. What is your occupation?
A. I am a physician and surgeon.
Q. How long have you been a physician and surgeon?
A. Seven years.
92 Q. Doctor, gove the jury, please what opportunities you have had to qualify yourself as physician and surgeon?
A. What educational?
Q. Yes.
A. I graduated at the University of Mississippi, then at Tulane Medical College. I spent two years as interne at the Charity Hospital, and have been practicing at Jackson since then.
Q. You are a regular licensed physician in this state?
A. Yes sir.
Q. Who are you practicing with?
A. Dr. J. F. Hunter.
Q. Of Jackson.
A. Yes sir.
Q. Now, Doctor, state to the jury, please, how long you have been engaged in the active practice at Jackson and where else?
A. Seven years at Jackson and two years in the Charity Hospital in New Orleans.
Q. State whether or not while you filled this position, you had quite a good deal of surgical work to perform?
A. We have a good deal of surgical work.
Q. Are you physician for any hospital in the City of Jackson and if so what?
A. We do work at the Charity Hospital and Baptist Hospital at Jackson.
Q. The Baptist Hospital is run by the Baptist Church, at Jackson?
A. Yes sir.
Q. You know the plaintiff, Mr. Pierce, here? (indicating P't'f.)
A. Yes sir.
Q. Do you recall when you first met Mr. Pierce?
A. In the early part of March, this year.
Q. With whom?
A. Dr. Ramsay of Crystal Springs.
93 Q. How long have you known Dr. Ramsay?
A. Five or six years.
Q. Have you known him intimately?
A. Yes sir, quite intimately?
Q. State whether or not from your experience and observation Dr. Ramsay is a reputable physician?

A. Yes sir.

Q. Do you know Dr. Crawford who has charge of the Infirmary in Hattiesburg?

A. Yes sir.

Q. State whether or not you think he is a reputable physician in good standing in this state?

A. Yes sir, thoroughly so.

Q. State just what you know about the amputation of Mr. Pierce's leg?

By Mr. BRADY: Defendant Objects, for the reason that plaintiff has already shown fully and in detail what was done with reference to the amputation of the plaintiff's leg.

Overruled. Exception.

Q. Tell just what you know about it; what examination you made and what you did, and how you came to amputate his leg?

A. Mr. Pierce consulted me and was brought to me by Dr. Ramsay of Crystal Springs early in March, for treatment for his leg. His ankle had been injured some months before that, and he came there, and after examining the ankle in company with Dr. Ramsay, Dr. Hunter, Dr. Wall and Dr. Thompson, who has an "X-Ray" machine, we decided the only treatment that stood any chance to give him a useful pedal extremity was amputation, with the use afterwards of an artificial extremity, and March 11th we
94 amputated his leg.

Q. Detail to the jury the condition of his limb when he first came there?

A. He came to us and stated that he had been injured in October in some railroad wreck or some kind of railroad injury. Since then he had been unable to use his leg, and when I examined his leg I found he had a severe crushing injury of his ankle joint. Had been operated on for blood poisoning at the time, and several incisions had been made on his leg. He had had six or seven incisions, and the leg, so far as the danger to his life was concerned, was practically all right. However, he had in his leg three things which determined me that an operation for amputation was the correct procedure. The three things consisted, of, first, dead bone in his leg. Some had been removed, but that would not have been any cause to cut off his leg, as that could have been removed, and perhaps he would have been all right; but we found on examining his ankle that he had ank*l*ose,—a stiff ankle joint, which possible could have been loosened up; but the most serious was posterior tibial nerve on the bottom of the foot. You could stick a pin in the bottom of the foot and he had no feeling in it. Long before that he had a small perforate ulcer on the bottom of his foot. The other conditions suggested amputation, but this condition determined amputation. I thought with this ulcer started, with a foot that had no feeling in it, and he had lost control of the muscles on account of the cut nerve, I don't think he would ever have a useful foot. The nerves can at times be anastomose-,—that is, sewed together. If you sew them together and get a result, you don't get the result for a year, because it takes a year for the nerve

fibers to reunite. So that with his dead bone and stiff ankle, and with the cut nerve I am sure in my mind that there was absolutely no safe treatment, and no correct treatment for that leg but
95 amputation. A man can take an amputated leg and get along much better that he would have been able to do if we had gotten an operation on his bone, stiff ankle, and cut muscle.

Q. State how far these incisions on the leg extended up, with reference to the knee?

By Mr. BRADY: Objection because the leg itself has been shown. Sustained. Exception by Plaintiff.

A. I don't remember, anyhow.

Q. State how far up you found the leg infected from the injury?

A. At the time he came to me the infection was only at the ankle.

Q. State what in your opinion as a physician—Please state whether this man suffered from that limb from the time of his injury up to the time it was amputated?

A. He must suffered a great deal. Of course after it improved he would not suffer so much.

Q. State whether or not in your opinion the leg would have improved if it hadn't been cut off?

A. I don't think he could ever have gotten the use of his leg with any formal treatment. I think it was a permanent disability. It was a greater disability than an artificial leg would be.

Q. Doctor, you were requested to come down here by me, the attorney for the plaintiff in this case?

A. Yes sir.

Q. Doctor, please state what was the color of this injured limb at the time he came to you?

A. It was more or less what we call scianotic—Any limb that is not used will get purple. It is bad circulation or congested blood, but that was from the disuse of the limb.

96 Q. Tell the jury whether or not the limb was of normal size at that time?

A. The ankle joint where the desease was was swollen, but the leg above that was normal.

Q. There was a small ulcer on the foot?

A. Yes sir.

Q. What odor, if any, did it have?

A. I don't recall the odor.

Q. Were you advised as to the treatment this man had from the infliction of the injury?

By Mr. BRADY: Object to what he was advised about it.

Overruled. Exception.

By Mr. DENT: I will withdraw the question.

Q. Assuming that he was injured on a wreck with the Easterling Lumber Company on the 15th, of October, 1911, and that he was administered to by a physician at Ora in some way to relieve him of his intense suffering there, and he was carried to the hospital in Hattiesburg and there attended by Dr. Crawford and his associate physicians there for some two months, and then he was brought back

to Ora, and attended there some three or four months by a physician, and then he went to Crystal Springs and was attended there by Dr. Ramsay, and he was then carried to the City of Jackson and there attended to by you, Dr. Hunter, Dr. Wall, and the "X-Ray" physician, and carried to the hospital and his limb amputated; now,—tell the jury what in your opinion would be a reasonable physician's fee for physicians who performed the operation, and by the different physicians?

By Mr. BRADY: Defendants object, for the service rendered by Mr. Davis at Ora as no fee is charged except that fee which the Plaintiff himself pays monthly for services.

97 By the COURT: I will sustain the objection without reference to what Dr. Davis did at Ora.

By Mr. BRADY: The defendant objects for the reason the Doctor's fees charged by the Doctors who did the operation at Hattisburg has charged a stipulated fee—no doubt have charged or may have charged a stipulated fee. There is nothing to show that Dr. Ramsay has charged anything, and testimony on what would be a reasonable fee for these services is not competent. It can be positively found what will be charged by the Hattiesburg physician, and he has testified positively what he paid the Jackson doctor.

By the COURT: I think it is best to sustain the objection.

Plaintiff excepts.

Q. Now, Doctor, state what your fees were, and that of Dr. Hunter and Wall, and the "X-Ray" physician?

A. I charged him $75.00 which he paid, and $5.00 for the "X-Ray"—made $80.00 and he paid a fee to the hospital, I don't know the exact amount. I think that was the extent of his fee, to me and to the "X-Ray."

Cross-examination.

(By Mr. BRADY:)

Q. Doctor his limb by reason of this operation,—he is in perfect shape for the use of an artificial leg?

A. I think he is, yes sir.

Q. Stand aside.

98 TIM SEARS (White) being called as a witness by the plaintiff after being duly sworn, testified as follows:

Direct examination.

(By Mr. DENT:)

Q. What is your name?
A. Tim Sears.
Q. Where do you live?
A. At Ora.
Q. How long have you lived there?
A. I have been there about three years.
Q. For whom are you working?

A. For R. B. Morris Tie and Supply Co.
Q. For whom were you working in October, 1911?
A. Easterling Lumber Company.
Q. Do you know the defendant here Mr. Will Tatum and Mr. John Tatum?
A. Yes sir.
Q. Do you know Mr. Sam Pierce here, the plaintiff in this case?
A. Yes sir.
Q. What were you doing in the Easterling Lumber Company plant at that time?
A. I was running the pump and firing extra.
Q. What orders if any did you hear Mr. Will Tatum give Mr. Pierce with reference to running No. 6?
A. I didn't hear any.
Q. What did Mr. Tatum tell you, if anything, on the morning before this injury;—what did he *tell* you, if anything, with reference to getting the engine out?

By Mr. BRADY: We object to anything that was told this witness, because he had nothing on earth to do with the running of the trains—he was running a pump.
99 By Mr. DENT: I confess his objection and withdraw the question.

Q. What were you doing the evening before the accident?
A. The evening before the accident happened?
Q. Yes?
A. I went to an unveiling—Woodman unveiling.
Q. What did you do that night?
A. I night-hostlered that night—I helped the night hostler that night.
Q. What instructions were given you with reference to getting No. 6 out on the following Monday morning and by who were they given?
A. They were given by Mr. W. W. Tatum—He said to have the engine ready to leave at 5 o'clock.
Q. To leave for what?
A. For the camps.
Q. What camps?
A. Their camps, Easterling Lumber Company's camps.
Q. What did he say, if anything, about getting the men out there?
A. He said he wanted to get the men out there on time, and to have the engine ready at 5 o'clock.
Q. Out where?
A. To the camps.
Q. That was the evening before this accident?
A. Yes sir.
Q. He wanted to get the men to the camps for what purpose?
A. For working, I suppose.
Q. Did you know anything about the orders under which No. 6 was run?
A. No sir, I didn't th-roughly know then.
Q. Did you know of your own knowledge how No. 6 was run out on Monday morning?

A. I know how it run when I was on it.

100 Q. How was it run?

A. It always went to the Camps Monday morning to take the men out.

Q. Cle-r through to the camps without stopping, except to pick up——

Objection. Leading and suggestive.
Sustained. Exception.

Q. Please tell where it would start and where it would stop on the mornings you went out there?

A. We would leave town and go to the camps, unless we had orders to stop at some certain place.

Q. By whom were the orders given?

A. By Mr. W. W. Tatum.

Q. That is Will Tatum?

A. Yes sir.

Q. Have you any recollection as to whether or not No. 6 with the passengers on there who were to work at the camps, ever stopped at the "Y" while you were on it?

A. They never stopped while I was on it.

Q. Tell the jury how many times you went out there?

A. I can't do that.

Q. Give them about how many times?

A. I went out there nearly every Monday morning for about two months.

Q. And the engine went straight through from the mill to the camps?

Objection: leading and suggestive.
By the COURT: Sustained; don't ask leading questions.

Q. What stops if any did they make those mornings in going from the mill to the camps?

101 A. I don't just remember. We have met the Shay Engine on the road, but I don't remember of meeting it at the "Y".

z Q. How did you quit the Easterling Lumber Company?

A. I quit them myself.

Q. Of your own volition?

A. Yes sir.

Q. State whether or not—if they have since this accident tried to re-employ you if so, when?

Objection; incompetent.
Sustained. Plaintiff excepts.

Cross-examination.

(By Mr. BRADY:)

Q. Mr. Sears, where were you on the night before this accident on Monday morning?

A. I was at Ora.

Q. You were the night hostler at Ora?

A. No sir, I was helping——

Q. You were helping the night hostler at Ora?
A. Yes sir.
Q. And you were ordered to have this engine ready by 5 o'clock?
A. Yes sir.
Q. You stated a minute ago you didn't know what the orders and rules were with reference to which had the right of way—The Shay or the No. 6?
A. I don't know for sure, no sir.
Q. You are not certain about that are you?
A. No sir, I couldn't swear to that.
Q. You won't say that the Shay engine didn't have the right of way, over the "Y" will you?
102 A. I don't know for sure of that.
Q. I say, then you won't say it didn't have the right of way?
A. I can't say it didn't have the right of way because I don't know.
Q. You say that you have rode engine No. 6 into the camps?
A. Yes sir.
Q. That is the engine that carried the men.
A. Yes sir.
Q. Isn't it a fact, Mr. Sears, that when it got to the "Y" it flagged over the "Y" when you rode it?
A. No sir, not when I rode it. When it was on the middle haul it didn't.
Q. I am talking about Monday morning?
A. Now?
Q. It did flag on Monday mornings over the "Y" didn't it?
A. Never while I was on it.
Q. On these Monday mornings when you rode it, the empties had been carried out before on Monday mornings by the Shay?
A? They had been carried out ahead of us.
Q. That is true isn't it?
A. Yes sir.
Q. It was the custom of the company to send the Shay down on Monday morning, and carry the empties out?
A. Carry them back to the camps.
Q. That is true isn't it?
A. Yes sir.
Q. The empties were left on Saturday night at the "Y" weren't they?
A. I think so, all the time.
Q. They were left on the end of the "Y" next to Ora, weren't they?
A. Yes sir.
Q. And the Shay would come down on Monday mornings and get those empties, wouldn't it?
103 A. Yes sir I guess so.
Q. You know it, don't you?
A. I don't know it to be a fact.
Q. You know it as well as these other things you have testified about? You are not certain about anything?
A. I am certain about some things I have said.

Q. You know that these empties were left on Saturday evenings on the "Y"?

A. No sir, I don't know ther were left.

Q. You have seen them left there?

A. Yes sir.

Q. What was Mr. Pierce doing when you saw them left on the "Y" next to Ora?

A. He was hauling logs from the camps to the "Y."

Q. He was hauling logs from the camps to the "Y" on what engine?

A. No. 6.

Q. And you have seen the empties left on Saturday nights on this "Y" and at the end next to Ora?——

A. Yes sir.

Q. While he was hauling——

A. Yes sir.

Q. Now then when you went over on 6 at the camps, the empties had already been taken up and carried over, hadn't they?

A. Yes sir they went ahead of us.

Q. On Monday morning?

A. Yes sir.

Q. That is true, isn't it?

A. Yes sir, every Monday morning I went out:—I didn't go out every Monday morning.

Q. But when you would go out, they would have gotten the empties before you all got there?

104 A. Yes sir.

Q. Isn't it a fact that there is some signals to be blown before you get to the "Y"?

A. I don't know of any, only the crossing.

Q. The road crossing?

A. Yes sir.

Q. That is just before you get onto the "Y," isn't it?

A. Yes sir.

Q. You don't know whether the 6 was ordered to wait for the Shay if the empties hadn't been picked up do you?

A. I don't know I never heard any orders to that effect.

Q. There may have been orders that the 6 was to wait at the "Y" if the empties were there?

A. There might have been, I don't know.

Q. You don't know about that?

A. No sir.

Q. And you don't know which train had the right of way over the "Y" do you?

A. No sir all I know is just the rules, the way they did there.

Q. If the empties were at the "Y" and at the end next to Ora, the 6-spot stopped didn't it?

A. I don't know sir. I never went out there when empties were sitting there on Monday mornings; they always got them and went to the camp.

By Mr. DENT: I insist that he permit the witness to conclude his answer before he asks another question.

Q. Have you any further statement to make?
A. Only what you ask me.
Q. Did I break into you- answer in any way or prevent you making a full answer in any way?
A. No, you didn't prevent me in making a full answer.
Q. All right. What sort of work were you do-ng at the time you left?
105 A. At the time I left the Company?
Q. Yes?
A. If I am not mistaken, I think I was running the pump, or working extra.
Q. How long did you work there?
A. I don't know how long I worked there.
Q. Mr. Tatum put a man in your place there didn't he?
A. Yes sir.
Q. Nothing was said to you whether you would leave or wouldn't leave; just another man took your place?
A. No sir, I quit myself.
Q. Did you notify him you were going to quit?
A. No sir.
Q. Did he have a man to take your job when you quit?
A. Yes sir, I suppose he did.
Q. When did you leave your pump?
A. I don't know just when I left it.
Q. Did you just walk off and leave the pump you were running?
A. No sir.
Q. Did you tell Mr. Tatum?
A. I don't know just how I quit. It seems to me I was off a few days and didn't go back.
Q. You were off on a vacation?
A. I was just laying off.
Q. Who took your place?
A. I don't know that.
Q. Did you tell Mr. Tatum you were going to lay off?
A. No sir.
Q. You didn't do that?
A. No sir.
Q. You went away one afternoon—was it in the afternoon, morning or evening when you left?
106 A. It was night I left the camps on the evening train.
Q. You finished the day's work?
A. I think I did; I don't know for sure.
Q. And you don't know which train had the right of way over the "Y" do you?
A. I don't know only just in my opinion.
Q. I am not asking your opinion. You don't know which train had the right of way over the "Y" do you?
A. No sir.

Redirect examination.

(By Mr. DENT:)

Q. Do I understand you to say it was customery for the Shay to leave the camps and go out and pick up the empties that were left there; if any were left there before No. 6 got there?

Objection; leading and suggestive.
Sustained. Plaintiff excepts.

Q. State what you know about it?
A. It was my impression——

Objection.

A. No. 6 always left and went to the camps, and went on through to the camps, if they didn't have any orders to stop at any certain place, when I was going out on it.

Q. Do you know what these empties were used for Sunday before the accident happened, if they were used for anything?
A. I don't know sir.
Q. Do you know who put them on the "Y"?
A. The main line engine I suppose.
107 Q. Do you know when they were put there?
A. On Saturday evening I suppose.
Q. You don't know that to be a fact do you?
A. No sir, I don't know it to be a fact.

J. M. BURNHAM (white), being called as a witness by the plaintiff, and being duly sworn, on oath testified as follows:

Direct examination.

By Mr. DENT:

Q. What is your name, please?
A. J. M. Burnham.
Q. Now, talk loud so the court and jury can hear you. Where do you live?
A. I live at Sanford.
Q. How long have you lived at Sanford?
A. Two months.
Q. Are you a man of family?
A. Yes sir.
Q. What is your occupation?
A. I am an engineer.
Q. State to the jury how long you have been an engineer?
A. Eight years.
Q. An engineer;—what kind of an engineer?
A. Log road engineer.
Q. How long have you been running a log road engine?
A. About 8 years.
Q. For whom are you working now?
A. For the Ship Island Lumber Co.
Q. That is a lumber concern in this county at Sanford?

A. Yes sir.

Q. For whom were you working in September, 1911?

108 A. I worked about 14 days for the Easterling Lumber Company.

Q. In what capacity?

A. Engineer.

Q. Engineer on what engine?

A. On the Shay. I don't know what the number of it was.

Q. Do you know the rules and regulations on the Shay at that time—how was it run?

A. I handled the loader; whichever way they would want me to go they would come to me and tell me.

Q. Mr. Will Tatum was your foreman, was he?

A. Yes sir.

Q. Was there an engine No. 6 at that time run by Mr. Pierce?

A. Yes sir.

Q. From where to where?

A. From the mill to the camps.

Q. For what purpose every Monday morning?

A. Carrying the men.

Q. Please tell the jury what instructions, if any, were given you by Mr. Will Tatum with reference to this engine No. 6 on Monday mornings?

A. It was just according to which way we were going to load about him giving me any at all.

Q. What, if any, did he give you with reference to No. 6?

A. If we were going to come east from the camp he would tell me where to meet him at.

Q. What, if anything did he say—what orders did he give you, if any, about running against 6 east?

A. Why, he *la*ways told me where to meet him was all the orders he would give me; whenever we would have to load this way, east.

Q. What was the regular schedule of No. 6, if you know?

A. They left the mill at 5:15.

Q. To go from where to where?

109 A. From the mill to the woods.

Q. Who had the right of way from the mill to the woods, in order to get the men out there?

By Mr. BRADY: Don't state unless you know.

A. I suppose according to my orders——

By Mr. BRADY: We object to his supposing.

Q. Just tell what you know from your orders?

A. The 6 had the right of way.

Q. The 6 had the right of way over the Shay engine?

A. Yes sir.

Q. For what purpose?

A. Carrying the men.

Q. From where to where?

A. From the Mill to the Woods.

Q. In doing that they passed this "Y" where the wreck is alleged to have occurred?

A. Yes sir.

Q. Please state whether or not Mr. Tatum told you not to get out on the time of No. 6?

A. Unless I had orders to.

Q. How often did you go out on that train Mr. Burnham?

A. Which train?

Q. No. 6 from the mill to the camps?

A. I never went out there but one time.

Q. On Monday morning?

A. No sir, it wasn't Monday morning; it was one day when they carried the feed out.

Q. Mr. Burnham, how did you quit the Easterling Lumber Co.? On good or bad terms?

A. On good terms, I guess.

110 Q. You quit on your own volition?

A. Yes sir.

Q. Do you know John Tatum?

A. Yes sir.

Q. How long have you worked there with John?

A. I worked there once two years while John was there.

Q. Tell the jury what he was at that time?

A. He was driving horses, I think when I was there.

Q. State to the jury whether or not, in your opinion, John Tatum on the 16th day of October, 1911, was a competent or incompetent engineer to run a Shay engine?

By Mr. BRADY: Objection, it is not a question of his opinion, that is a question of actual knowledge.

By the COURT: Do you know whether he was or not?

A. He was.

Q. What do you mean by that?

A. The question you asked me a while ago I guess is what they had reference to.

Q. What do you mean by that—he was competent or incompetent?

A. The other question you asked, what was he doing when I was there the first time.

Q. What I want to know is, state to the jury whether or not John Tatum, who was on the Shay engine the morning of the wreck, running the Shay engine, was competent or an incompetent engineer?

A. He was incompetent.

Q. Tell the jury what you mean by incompetent?

A. He didn't know anything about an engine is what I mean by incompetent.

Q. When you answered that question before you didn't understand the question—you meant he was competent to drive horses?

111 A. What they had reference to I guess, was the other question you asked me, and it wasn't this one.

Q. Tell the jury there, what interest if any you have in this controversy?

A. I don't understand the question?

Q. What interest have you got in the result of this suit—have you any interest for the Easterling Lumber Company, or Mr. Pierce?

A. No sir.

Q. Does it make any difference to you which way it is decided?

A. No sir, not a bit.

Cross-examination.

(By Mr. BRADY:)

Q. How long did you say you worked for the Easterling Lumber Company in 1911?

A. I never worked for them in October.

Q. When did you work for them?

A. In September.

Q. What year?

A. 1911.

Q. You were not at work there in October?

A. No sir.

Q. You don't know what the rules of the Company were on the subject of which engine had the right of way—in October 1911?

A. No sir.

Q. You don't know anything about that?

A. Don't know anything about it.

Q. How long did you work there in September?

A. 14 days.

Q. You didn't work there but 14 days?

A. I didn't work over 14 days.

112 Q. You didn't have time to get very familiar with what the orders were with reference to running trains, did you?

A. Only what I said.

Q. You didn't have time to get very familiar did you?

A. Yes sir, I had time to get familiar with all the orders I got.

Q. Was Mr. Pierce at work there then?

A. Yes sir.

Q. What was he doing?

A. He was running the 6.

Q. Engine No. 6?

A. Yes sir.

Q. Where were the empties left on Saturday nights?

A. They were left at the camps when I handled them.

Q. Did you ever see some of them down at the "Y"?

A. Yes sir, I taken them to the "Y" sometimes.

Q. On Saturday nights?

A. No sir.

Q. Did you ever see any of them left at the "Y" on Saturday nights?

A. No sir.

Q. You never saw that?
A. No sir.
Q. Were any of them ever left at the "Y" on Saturday nights while you were at work there?
A. No sir, I had orders to carry the empties to the Camp.
Q. Who gave you those orders?
A. Mr. Tatum.
Q. Wasn't that order changed while you were running, and wasn't that order changed and the empties ordered to be left at the end of the "Y" next to Ora?
A. Not while I was there.
113 Q. Not while you were there?
A. No sir.
Q. You don't know whether there was an order in effect at the time this injury occurred?
A. No sir.
Q. Did you ever run the 6-spot?
A. No sir.
Q. Do you know what orders were given regularly to the engineer who ran the 6-spot?
A. No sir.
Q. Do you know what orders were given to the engineer who run the 6-spot on Monday mornings, about stopping at the "Y"?
A. No sir.
Q. You won't swear the 6-spot wasn't told to stop and wait at the "Y"?
A. No sir.
Q. You won't swear it wasn't told to stop and switch until the Shay got down and got the empties, will you?
A. No sir.
Q. You won't swear that the Shay didn't have the right of way over the 6-spot on the "Y" to pick up empties Monday morning, will you?
A. No sir, I don't know anything about the orders at that time.
Q. You won't swear—what did you run—the Shay?
A. Yes sir. I didn't have any orders to pick up any empties there. The only way we ever met him coming East was when we would load the logs at Hemeter's camp.
Q. That is not the "Y"; that has nothing to do with the place where this accident occurred?
A. No sir.
Q. Did you ever talk to anybody about this case?
A. Why, no sir, not particularly I have asked about Sam and how he was getting along.
114 Q. Did you ever tell anybody what you were going to swear to?
A. No; I—Mr. Dent, I believe ask- me a few questions.
Q. But you didn't tell him what you were going to say?
A. I told him some of it.
Q. Now, then, you won't tell the jury that when the cars or

empties were down at the "Y" that the Shay engine didn't have the right of way over the 6 will you?

A. Why, I don't know whether they had the right of way or not, because I never did leave them there. Whenever we had to come east we always had orders to meet him at Hemeter's switch. I never met him at the "Y"; I passed him at the "Y" but never met him there.

Q. You passed him at the "Y"?

A. Yes sir, or he passed me at the "Y".

Q. Didn't you state you passed him at the "Y".

A. He passed me at the "Y".

Q. Didn't you state just a minute ago that you passed him at the "Y"?

A. He pushed me over the hill one evening.

Q. That is not the question:—didn't you state just a minute ago you passed him at the "Y"?

A. I didn't mean it;—if I said it, I don't know——

Q. Don't know now you stated just a minute ago that you passed Mr. Pierce at the "Y"?

—. ——.

A. That is not what I asked you. If your Honor please I want the witness to answer the question.

By the COURT: Answer the question.

Q. Don't you know you just stated now you passed Mr. Pierce at the "Y"?

A. I backed in the side track and passed him.

Q. I didn't mean that.

A. Well, I did pass him.

115 Q. Didn't you state a moment ago, and don't you know now you did state a moment ago, that you passed Mr. Pierce at the "Y"?

A. Well, I may have said that; well I guess I did, he pushed me over the hill.

Q. That isn't it;—did you say that? Did you say you passed him at the "Y" a minute ago?

By the COURT: Did you say that or not?

A. I don't know.

Q. You can't recollect what you said a minute ago in this examination, Mr. Burnham?

A. (Witness pauses.) Yes I said I passed him at the "Y", both going the same way.

Q. Now you admit you did say it?

A. I did say it.

Q. You did pass him didn't you?

A. I passed him backing in the side track: he was on the main line and I went on the side track.

Q. Then he passed you and you didn't pass him?

A. I did pass him because I went down the "Y" past him.

Q. Is that what you meant -while ago when you told the jury you passed him?

A. Well, I passed him.

Q. But I say is that what you meant -while ago when you told the jury you passed him?
A. Yes sir.
Q. Where were you at work at the time you were handling this Shay? What part of the woods?
A. I worked from the mill back to the end of the track.
Q. You ran the Shay from the mill to the end of the track then?
A. When we picked up the logs that fell off along the road, I went all the way.
116 Q. During the time you were there you scrapped up the road all the way?
A. Yes sir.
Q. When you were not doing that where did you work?
A. I worked at the camps.
Q. How far was that from the "Y" at which this accident is said to have occurred?
A. It must have been two or three miles.
Q. Did you succeed Mr. Pierce as the Shay engineer?
A. I don't know whether I did or not.
Q. Do you know whether or not he was a Shay Engineer.
A. No sir.
Q. You don't know that?
A. No sir.
Q. Do you know whether or not he stopped while running 6 for the Shay to come over and pick up empties on Monday Mornings?
A. No sir, I don't know whether he did or not.
Q. Do you know what the orders were with reference to what 6 was to do on Monday mornings?
A. No sir; I never got 6's orders.
Q. There may have been a standing order for 6 to flag over the "Y" on Monday mornings; if the empties were gone from there?
A. It might have been; I don't know it if there was.
Q. You say you don't know it. You never went down there on Monday mornings, and you don't know what orders 6 had with reference to waiting for the Shay if the Shay was due to go there?
A. I don't know about that.
Q. Where did you first work as an engineer for a logging road?
A. At Bruden, Alabama.
Q. Are you a Mississippian?
A. No sir.
117 Q. You are an Alabamian, are you?
A. Yes sir.
Q. Who did you work for in Alabama?
A. For Harold Brothers & Scott.
Q. Where did you next work?
A. At Ora.
Q. Where did you next work?
A. I don't know sir; it was at Ora though.
Q. Where did you next work?
A. For the Finkbine Lumber Company.
Q. Where did you next work?

—. At Jamestown, Mississippi.
Q. Then where did you go?
A. Came back to the Easterling Company.
Q. Then where did you go?
A. As an engineer?
A. Yes.
A. I went to Sanford.
Q. And you are at Sanford now?
A. Yes sir.
Q. And you have worked on and off 8 years in the logging department of railroads?
A. Yes sir.
Q. That is your experience?
A. Yes sir.
Q. You of course went to Mr. Pierce and told him what you knew about the case:—that you had railroaded there before, and told him that you knew about the orders?
A. No sir, I never told him about the orders.
Q. You never communicated with him at all about what you knew about this case?
A. This case?
Q. Yes?
118 A. No sir.
Q. You never discussed it with him?
A. No sir.
Q. You are absolutely unable to account how they found out what you knew about it?
A. Oh:—I—Mr. Bob Dent ask- me a few questions is all.
Q. But you don't know how he found out any thing about it at all?
A. No sir.
Q. It is absolutely unaccountable to you.
A. (No answer.)

Redirect examination by Mr. DENT:

Q. State whether or not you were summoned to appear here and testify in this case?
A. Yes sir, I was summoned.
Q. When you were summoned, did you ever talk to any body about the case at all?
A. No sir.
Q. Sam Pierce knew that you were an engineer there at the time he worked there didn't he?
A. Yes sir.
Q. And he knew you were acquainted with the rules of the Company?

By Mr. BRADY: All of those questions are leading and suggestive and highly improper.

Q. If the Shay passed you on the "Y", and you passed it, necessarily each one passed the other?

A. Yes sir.

Q. There is no other way to run on a railroad there unless you run as you did this day and crushed this man's leg off, was there?

A. No sir.

119 Objection.

By Mr. DENT: All right I ask that the objection be sustained, and withdraw the question.

B. W. WALKER (White), Being called as a witness for the plaintiff, and being duly sworn, on oath testified as follows:

Direct examination.

(By Mr. DENT:)

Q. What is your name?
A. B. W. Walker.
Q. Where do you live Mr. Walker?
A. My folks are at Ora, Mississippi.
Q. What is your occupation?
A. Engineer, I have been for the past four years.
Q. What kind of an engineer?
A. Locomotive engineer.
Q. Where are you working now?
A. For the South Alabama Lumber Co.
Q. For whom were you working in July and August, 1911?
A. 1911?
Q. Last year?
A. I worked some in Louisiana, and some for the Easterling Lumber Company.
Q. How long did you work for the Easterling Lumber Company?
A. Between about 12 and 15 days, as well as I remember.
Q. What train or engine did you run there?
A. I wasn't running an engine at all then.
Q. In what capacity did you work?
A. I was switching.
Q. Where?
A. I was switching in the woods upon the Shay.

120 Q. Mr. Walker, did you know at that time the rules and regulations with reference to the right of way of 6 on Monday morning, or the morning it carried the men from the mill to the camp?

By Mr. BRADY: Don't state unless you know Mr. Walker.

A. I have switched upon the Shay in the woods, and rode the 6 backwards and forwards night and morning for what time I was there. I didn't stay at the camps I went backwards and forwards. It was supposed to pull the men backwards and forwards night and morning, and we were supposed to leave the mill at 5:15 to go to the woods.

Q. What do you mean by the woods?

A. Back to the camps where I was at work.
Q. What train had the right of way from the mill to the Camp?

Mr. BRADY: Don't state unless you know.

A. The 6 I suppose.

By Mr. BRADY: We move to exclude what the witness supposed. Sustained.

Q. In the acaual running of the train while you were on it, who had the right of way to run from the mill to the camp?

By Mr. BRADY: Don't state unless you know.

A. The time I was there the 6 was the only one on the road in the morning until she got back to the camp.
Q. On what part of the road was she on?
A. From the mill to the camps on the main line.
Q. That both passes "Y's" going from the mill to the camp, didn't it?
A. Yes sir.
Q. And the 6 had the right of way?
A. From the mill to——
Q. Where?
121 By Mr. BRADY: The witness has never stated where the 6 had the right of way, and he never stated it did have it, but he stated it was the only train he saw when he rode out.
Q. Do you know Mr. John Tatum?
A. Yes sir.
Q. What morning did you ride on that train No. 6?
A. What morning?
Q. Yes, when you go out with the hands?
A. I rid it every morning for what time I was there.
Q. Did you ride out on Monday morning?
A. Ye- sir, I fired it out there one morning because it was short of a fireman.
Q. What train had the right of way that morning?——

By Mr. BRADY: Wait a minute——

Q. How did it run?
A. When it left the mill it didn't stop until it got to the camps, except stopping picking up the working men. It stopped west end of the "Y" and picked up men and went on to the camp.
Q. Did it go over the "Y" or main line?
A. It went over the main line the neck of the "Y".
Q. Do you know John Tatum?
A. Yes sir.
Q. From your experience as engineer, tell whether he was a competent engineer?

By Mr. BRADY: The defendant objects, because the witness worked only 14 days for the Easterling Lumber Co.

By Mr. DENT: We withdraw the question.

122 Cross-examination.

(By Mr. BRADY:)

Q. Do you know what orders were given engine No. 6, so far as the engine was concerned and the "Y" was concerned, when you were going on No. 6 as a passenger?

A. Why——

Q. You never heard any orders given the engineer, did you?

A. Yes sir, I heard orders given the engineer on the Shay.

Q. That is not what I want——

A. The orders the engineer had on No. 6?

Q. Yes?

A. No sir I don't know what orders he had.

Q. So far as you know, he may have told, if empties were on the "Y" at the end next to Ora, to wait for the Shay?—That is so isn't it?

A. I don't know about that.

Q. He may have had such orders?

By Mr. DENT: Unless he knows;—it is not his opinion about it. Overruled. *Exception.*

Q. The engineer running 6 may have been told to wait at the end of the "Y" next to Ora, if flat cars or empties were on the "Y"?—That is true, isn't it?

A. So far as I know he could have been told that. Of course I wasn't firing the engine and I don't know.

Q. They did leave empties on the "Y" didn't they?

A. No sir, I never seen any empties setting on the "Y" for *for* other trains to pick up, the 15 days I was there.

Q. When were you there?

A. As well as I remember it was about the first of August; I won't be certain whether it was the first of August or last of July.

123 Q. You are not certain as to the dates?

A. No sir.

Q. You did what at that time? Handle the switch engine?

A. I was switching around——

Q. You never went *of* the camp but two Monday morning, then, if you worked there 15 days?

A. I won't be certain whether it was Monday morning the first time I went out or not. If I did I rode in three Monday mornings.

Q. If you worked there 15 days, the extreme limit of time you could have gone out Monday mornings was three, wasn't it?

A. I wouldn't say whether I was there three Monday mornings or not.

Q. You don't know do you?

A. No sir.

Q. Do you have any distinct recollection of those Monday mornings you went there?

A. I know I went on Monday mornings.

Q. Have you any distinct recollection of what was done along the way the particular Monday morning you went out there?

A. Yes sir, I remember the one I went out there firing.
Q. There were no empties on the "Y" on Monday morning?
A. No sir, there wasn't any empties there, but when we got back to the camp as far as the 6 run back, we walked a half mile to the switch engine at the camps where she was at work.
Q. What did the 6 do the morning you helped pull her out?
A. She worked on the swing pulling between the camps and the "Y".
Q. Why did you stop your engine and walk that distance that day?
A. I didn't stop it, I fired on out, and it didn't go out to my job, and I walked on to my work.
Q. That was on Monday morning and you didn't see any empties there Monday morning. Did you get out another Monday morning?
A. Yes sir.
124 Q. Do you have any distinct recollection of what happened that Monday morning?
A. No sir.
Q. Did you see any empties that Monday morning?
A. I don't know whether there was or not. If there was any there I know we never picked them up. I say we never picked up any while I was riding it while I was there.
Q. I asked you if you had any distinct recollection of what you had any other Monday morning except the Monday morning you fired the engine?
A. No sir, I was just going back to my job on the engine.
Q. How long after Mr. Pierce was hurt was it before you heard about it?
A. It was along just before Christmas.
Q. Where were you then?
A. I had come back home at Ora.
Q. Mr. Pierce was then in Ora?
A. Yes sir.
Q. You saw him while he was injured?
A. Yes sir.
Q. And you talked to him?
A. Yes sir, a time or two and asked him how his leg was.
Q. Talked to him as — what the rules were?
A. No sir.
Q. Never discussed it with him?
A. No sir.
Q. Never mentioned it to him in your life?
A. No sir, no- that I know of.
Q. Then you went away, after you came back to Ora, did you, in December?
A. Yes sir, I styed at Ora a couple of months, and then I went to Alabama.
125 Q. From the time you left in August until you came back in December, you never thought anything about how you went out on these trains, did you?

A. No, no way, only when a man is working he knows about what he has done.

Q. I am talking about what you thought—after you left there in July or August, until December and until you learned of Mr. Pierce's injury, you had nothing to impress you with what you did or the trips you made, did you?

A. No sir.

Q. That is true, isn't it?

A. Yes sir.

Q. And you don't know what orders were given No. 6 with reference to waiting for the Shay if empties were on the end of the "Y" next to Ora, do you?

A. No sir I don't know whether he was given any orders or not.

Q. Was Mr. Pierce at work for this company at the time you were?

A. Yes sir, he was running the Shay.

Q. You don't know whether he frequently placed empties down on the end of the "Y" next to Ora, do you?

A. No sir, because I wasn't there.

Q. You don't know what he did about that, do you?

A. No sir, I wasn't there at the time—he didn't place any there while I was switching behind him with the Shay.

Q. You were there only two weeks?

A. Yes sir.

Q. You don't know whether or not it was the custom to have empties left on the end of the "Y" next to Ora, do you?

A. No sir, I don't know whether it was or not.

Q. You say you are an engineer, too?

A. Yes sir, a log engineer, I am not a main line man.

126 Q. How long have you been running an engine?

A. Four years.

Q. Where did you first run an engine?

A. The first engine I ever run was for the Genessee Lumber Company in Louisiana.

Q. How long ago was that?

A. I suppose it was four years ago.

Q. That would be 1908, wouldn't it?

A. I was only counting how long I have been running an engine; it may have been six years when I did my first running.

Q. How many places have you worked at in the last three years?

A. I believe I have been on about five jobs.

Q. Five jobs in three years.

A. Yes sir.

Q. And do-ing some of the time you didn't work at all?

A. Let me study over that a little—(pause). I don't know whether I have been at that many jobs or not.

Q. You said you had, didn't you?

A. I said about.

Q. Then fix it at a less number if you wish, and let us see what the truth is about it.

A. I suppose it has been for the last four years I have worked on that many jobs.

Q. How many have you worked on in three years?
A. I couldn't say.
Q. You said a minute ago, you had worked on five; were you right about that?
A. I said about five; somewhere along there; I wouldn't be sure.
Q. Were you running a locomotive all the time?
A. No sir; part of the time I was running and part of the time I was firing.

127 Redirect examination.

(By Mr. DENT:)

Q. Do you know Mr. Pierce, here, you say?
A. I know of him when I see him. The first time I ever met him was last July or August.
Q. When did you work up there?
A. Between 12 and 15 days.
Q. Would you say he was a competent or incompetent engineer?

Objection.

Q. All right, stand aside.

Here the plaintiff rests.

Here the jury retired from the court room, and the following proceedings were had in the absence of the jury:

By Mr. BRADY: The defendant in this case now moves the court to allow it, the Easterling Lumber Company, to file special notice under the general issue, amending and enlarging its special notice under the general issue on the subject of the fellow-servant doctrine plead in a notice and under its general issue before entering into the trial of this case, and setting up contributory negligence and assumptional risk in addition to the fellow-servant doctrine formerly plead.

By Mr. DENT: We object on the ground: First. That it is filed out of time. Second. Because it does not set up and defense under the laws of the State or of the United States. Third. Because he has already pleaded contributory negligence. Fourth. Because the facts set up in said special plea are not applicable to the particular facts developed in this case.

128 Overruled. Plaintiff excepts.

The counsel for the defendant here reads the motion, as follows:

The plaintiff will take notice that the defendant will show by affirmative evidence, and will offer affirmative evidence to show and tending to show, under its plea of general issue, that the injuries suffered by the plaintiff then and there occurred through and by the act of a fellow servant, then and there engaged about the same work, and for which the defendant is not responsible; but whose negligence, if any, was one of the assumed risks taken by the said plaintiff at the time of his employment, and that the statutes of

the State of Mississippi, Chapter 194, Acts of 1908, page 204, if applied to the injury in question violates the Federal Constitution in that it is contrary to the Fourteenth Amendment thereof, denying to the defendant the equal protection of the laws; depriving it of its liberty and property without due process of law, and that under said Constitution of the United States, the said State of Mississippi is wholly without the power to pass an act which appl-es to every employe- of certain persons without regard to the nature of the employment of such employes, and in that an act as appiying, would violate said Federal Constitution, and that said statutes cannot be severed judicially as so to do would be judicial legislation, and that to impose liability upon the defendant in this cause by reason of said action would be violative of the Federal Constitution.

And furthermore, that said act is void because violative of said Constitution, because it deprives defendant of its liberty and property without due process of law, and denies to it the equal
129 protection of the law. That the said plaintiff then and there assumed the risk incident to the running of engine No. 6 and the Shay engine; that the said defendant, the Easterling Lumber Company, was not guilty of any actionable negligence; that the said plaintiff was guilty of negligence approximately causing and contributing to his said injury in that he did not at time of said injury and immediately prior thereto conduct himself as an ordinarily prudent person would or should have done, and then and there refused for his own safety, and wholly failed and refused to stop his said engine and thereby prevent his injury, and wholly failed to observe the rules of the defendant not to enter upon said "Y" without protecting against said Shay engine, and without waiting for said Shay engine.

That both of the Easterling Lumber Company's co-defendants are fellow-servants of the plaintiff in this case, and all negligence on their part does not entitle the plaintiff to recover in this case, since the plaintiff assumes the risk of all such negligence charged by him against the defendant.

(Signed) EASTERLING LUMBER COMPANY,
By T. BRADY, JR., *Attorney.*

By the COURT: The court having heard the plea read, that the defendant desires to interpose at this time, sustains the objection made by plaintiff to its being filed and read to the jury.

130 By Mr. BRADY: The defendant excepts to the ruling of the court, for the reason that the matters sought to be proven under notice sought to be filed under the general issue plea-, are a defense; and for the reason that the notice sought to be filed is in amendment of a notice formerly filed; and the Defendant has a right, at any time before the case is submitted to the jury and pending the trial, of the case, to amend its plea so as to present to the jury the issue of the case;—and to deny the defendant, the Easterling Lumber Company, this right, is highly prejudicial to its interest, and practically denies it a defense in the case.

By Mr. BRADY: Now comes the defendant, the Easterling Lumber

Company, in this case, and moves the court to exclude the testimony offered by the plaintiff, so far as it is concerned, and for a peremptory instruction for the Defendant, for the reason that the injury suffered by the plaintiff then and there, occurred through and by the act of a fellow-servant, then and there engaged about the same work, and for which the defendant is not responsible; but whose negligence, if any, was one of the assumed risks taken by the said plaintiff at the time of his employment, and that the statutes of the State of Mississippi, Chapter 194 of the Acts of 1908, page 208, if applied to the injury in question, violates the federal Constitution, in that it is contrary to the Fourteenth Amendment thereof, denying to the defendant the equal protection of the laws, and depriving it of its liberty and property without due process of law, and that, under said Constitution of the United States, *and* said State of Mississippi is wholly without the power to pass and act which applies to every employer of certain persons, without regard to the nature of

131 employment of such employees, and in that an act so applying would violate said Federal Constitution, and that said Statute cannot be severed, judicially, as so to do would be judicial legislation, and that to impose liability upon the defendant in this case by reason of said action would be violative of the Federal Constitution. And that the statute of the State of Mississippi, Chapter 135 of the Acts of 1910, page 125, if applied to the injury in question, is violative of the Constitution of the United States, in that it is contrary to the Fourteenth Amendment thereof, denying to the defendant the equal protection of the laws, depriving it of its liberty and property without due process of law, and that under the said Constitution of the United States, the said State of Mississippi is wholly without power to pass an Act which applies to every employer of certain persons without regard to the nature of the employment of said employees, and is without power to pass such an act, depriving the courts of the country from passing upon the legal question involved; that the said Act 135 denies to the Defendant the defense of contributory negligence, although such negligence may have been gross, as was the negligence of the plaintiff in this case, and in so doing violates the Federal Constitution, and deprives the defendant of its liberty and property without due process of law, in that under the Constitution of the United States, the said State of Mississippi is wholly without the power to pass such an Act depriving the courts of the right to pass upon legal questions, and depriving the court of the right to take the case from the jury.

And, furthermore, that both of said Acts of 1908 and 1910 are void, because violative of the Constitution of the United States, because both of said acts deprive the defendant of its liberty and property without due process of law, and *denies* it the equal protection of the law, and especially is this true of Chapter 194, Acts 1908, page 204.

132 That the said plaintiff then and there assumed the risk incident to the running of engine No. 6 and the risk incident to the running *if* the Shay Engine, and that the said defendant,

Easterling Lumber Company, was not guilty of any actionable negligence, and that the said plaintiff was guilty of negligence, approximately causing and contributing to his said injury, and that he did not at the time of said injury, and immediately prior thereto, conduct himself as an ordinarily prudent person would have done, and then and there refused for his own safety, and wholly failed and refused to stop his engine and thereby prevent his injury, and wholly failed to observe the rules of the defendant, not to enter upon said "Y" without protecting against said Shay Engine, and without waiting for said Shay Engine; and for the reason that both of the Easterling Lumber Company's co-defendant- are fellow-servants with the plaintiff in this case, and all negligence on their part does not entitle plaintiff to recover in this case, since the plaintiff assumed the risk of all negligence charged against him by defendant, and attempted to — proven.

By the COURT: The motion is overruled.

To which ruling of the court the Defendant then and there excepted.

By Mr. BRADY: Now comes the defendant and moves the court to exclude all of the testimony of the plaintiff's witnesses Burnham and Walker, for the reason that they did not know what the rules of the company were relative to the right of way, for the reason they were not even in the employ of the defendant at the time of the accident.

By the COURT: The motion is overruled.

To which ruling of the court the Defendant then and there excepted, and does still except.

133 Here the jury returned into the court room, and the following proceedings were had in their presence:

J. L. MCLENDON (white), being called as a witness for the defendant, and being duly sworn, on oath testified as follows:

Direct examination.

(By Mr. BRADY:)

Q. Mr. McLendon where do you live:—where do you work?

A. I live at Ora.

Q. Where do you work?

A. I work for the Tie Supply Company at Mount Olive.

Q. You will have to speak louder than that so the gentlemen over there can hear you. Have you any interest in this case?

A. None whatever.

Q. Where do you work? Are you connected with the Easterling Lumber Company?

A. Not at all.

Q. Where did you work before you went with the Tie Company?

A. The last work I done was for the Easterling Lumber Company.

Q. Where were you working in September, 1911?

A. I wasn't working any place.

Q. Where were you working in August, 1911?
A. For the Easterling Lumber Company.
Q. When did you quit work for that company?
A. The last of August.
Q. What month, do you remember?
A. It was in August.
Q. Where was Mr. Pierce working at that time?
A. He was working for the Easterling Lumber Company.
Q. What were you doing for the Easterling Lumber Company?
A. Running an engine.
Q. What was the number of that engine?
A. Six.
134 Q. What was Mr. Pierce doing?
A. He was running the Shay engine.
Q. Where did Mr. Pierce go on Saturday evenings, after the work was over?
A. I guess he went home.
Q. What train did he ride on?
A. As a general thing he takes his engine to the mill every Saturday night and done his work and washed out as a general thing.
By Mr. DENT: Don't testify as a general thing. Testify specifically to what you know.
By the COURT: I think that is competent.
Q. You are not guessing about that, are you?
A. No sir.
Q. What was it he generally did?
A. As a general thing he taken his engine to town Saturday night and washed out, and taken the men back to the camps every Saturday night.
Q. What engine was he running then?
A. The 5—the Shay engine.
Q. Was he ever with you when you run the 6 on Monday morning?
A. Yes sir.
Q. What would he do when he got to the "Y"?
A. If his engine was there, he would take it and pick up his empties and take them back to camp.
Q. What empties?
A. The empties that were left over on Saturday evening.
Q. Where were those empties left? What end of the "Y"—nearest Ora or Furthest from Ora?
A. Nearest Ora.
Q. What would you do with the 6-spot when you went out on the "Y"?
135 A. I always waited there to see where the Shay was, and if the Shay hadn't picked up the empties and taken them off, I would flag over.
Q. What would you do?
A. I would flag over if he hadn't come after them.
Q. What does flag over mean?

A. It means to send a man ahead.
Q. To walk far enough ahead to stop the Shay?
A. Yes sir.
Q. You say Mr. Pierce rode out with you on No. 6?
A. Yes sir.
Q. And would get off when the empties were there and get the empties with the Shay and go over?
A. Yes sir.
Q. Did he do that often?
A. I remember of his doing that once or twice.
Q. Where were these empties left, if anywhere, on Saturday night?
A. They were always left at the "Y".
Q. Why did you wait before you went to the "Y"?
A. That was the rule; that was the order I had.
Q. That was the order, then, when Mr. Pierce was running the Shay and when you were running the 6?
A. Yes sir.
Q. Which one of the trains had the right of way on Monday morning?
A. The Shay had.
Q. That was when Mr. Pierce was running the Shay he had the right of way?
A. Yes sir.
Q. How long did you run that engine?
A. I worked for the Easterling Lumber Company 2 years.
Q. Have you any interest in this case now one way or the other?
A. No sir.
136 Q. When you quit, Mr. Pierce commenced to run what engine?
A. The 6.
Q. Up until you quit, what engine had the right of way on the "Y" on Monday morning?
A. The Shay.
Q. Up until you quit, the engine that Mr. Pierce had had the right of way on the "Y"?
A. Yes sir.
Q. It was the duty of No. 6 before going on the "Y" to do what?
A. To wait for the Shay and see where the shay was.

Cross-examination.

(By Mr. DENT:)

Q. What is your occupation Mr. McLendon?
A. Engineer.
Q. Where?
A. I am not running an engine any place now. The last work I did in engine work was for the Easterling Lumber Company.
Q. When?
A. In August.
Q. What year?

A. 1911.

Q. What are you doing now?

A. Checking Lumber for the Morris Tie Company.

Q. Where?

A. At Mount Olive. Well, since they have moved to Mount Olive; the last work I done was in Collins.

Q. Are you a married man?

A. Yes sir.

Q. Were you at Ora last Friday or Saturday—or Monday or Tuesday of this week?

A. I think I was; I have been there all week.

137 Q. In conference with Mr. Reimers and all the other witnesses in this case, in the office of the Easterling Lumber Company, where this case was fully discussed?

A. Yes sir.

Q. You were there with all of them?

A. Yes sir.

Q. And you all talked it over,—Mr. Reimer and the Tatums and all of them?

A. Yes sir.

Q. Did you talk it over before that time?

A. No sir.

Q. You hadn't been summoned until that time, had you?

A. No sir.

Q. It is the proper thing to do, to sidetrack a train with work people on it to wait for the idle train—That is the proper thing to do isn't it?

A. I don't know sir.

Q. It was the custom of this company to sidetrack this train that Sam Pierce was on with these working people, and sidetrack it, and keep these people off the "Y" in idleness rather than carry them on to the camp?

A. That was the rule.

Q. To get them up at 3 o'clock in the morning, and bring them down there and sidetrack them, and wait for an idle train to come out from the camps and get some empties ahead of them? That is the way it was done?

A. Yes sir, that was the rule.

Q. You don't know what change was made with reference to the time of running No. 6?

A. Not after I left.

Q. The Shay always came out when there were empties—There were not always empties on this "Y" were there?

A. Not always, No sir.

138 Q. Therefore it wasn't necessary for the Shay to come out every Monday morning was it?

A. As a general thing they were left at the "Y" over every Saturday evening.

Q. How do you know Mr. McClendon?

A. I worked out there two years, and during the time I worked out there they were left out there every Saturday evening.

Q. You were out t- the camp weren't you?
A. No sir, I was living at the mill.
Q. How do you know what happened out on the "Y" and at the Camps?
A. I don't know what happened at the "Y" and Camps only when I was out there.
Q. You were not at the "Y" every Monday morning were you?
A. Yes sir; while I was working there—I wasn't there either every Monday morning unless I was out there.
Q. Did you ever run 6 out?
A. Yes sir.
Q. You run from the mill to the camp?
A. No sir, I ran from the mill to the "Y".
Q. You tell this jury you would sidetrack there on the "Y" and keep these mill men waiting there and hold them, rather than get out to the camps and to work?
A. That was the orders I had
Q. Don't you know as a matter of fact that the orders were for the Shay engine to come from the camps to the "Y" and get those idle cars if there were idle cars there and carry them back to the camps before No. 6 got out there with these working people?
A. If that was the rule I don't know anything about that.
Q. Didn't they do that frequently?
A. Yes sir, they would come out and get the cars before we would you get there lots of times.
139 Q. Now Mr. McClendon, I believe you stated there were not always empties left on the "Y"?
A. Yes sir, I did.
Q. But you state that No. 6 always waited on the "Y"?
A. I said without the empties had been moved. If the empties had been moved, the 6 went on to the camp.
Q. Now then, it was the duty of the Shay engine to get up early enough in the morning and come out there and move those empties so as not to delay No. 6 wasn't it?
A. I don't know about that.
Q. You don't say that is not the fact?
A. I don't know because they would be moved some of the mornings and sometimes they wouldn't.
Q. When you took No. 6 from the mill to the camp and those empties had been moved how would you know the Shay had been there?
A. Because I knew they were there Saturday night, and weren't there Monday morning.
Q. How could you tell how to run, to keep from running onto the Shay?
A. I just kept looking ahead.
Q. There is only two men on the Shay usually, isn't there?
A. I suppose there was three:—the engineer, fireman and switchman.
Q. That was the usual thing wasn't it?
A. Yes sir.

Q. All the Shay had to do was to come out and get those empties wasn't it?

A. I suppose so.

Q. You say on your oath to this jury, this mill company would back this train of people in on the "Y", and wait for the idle train and empty cars to get out and get ahead of this train on which the men who did the work were, do you?

A. Yes sir, if the empties had not been moved we waited for them.

140 Q. In other words, they got the empty cars there before they got the men there to work with them, that is right isn't it?

**A. Yes sir.**

Q. And rather than to permit the Shay with the idle cars to be delayed, they gave the Shay with the idle cars the right of way over the 6 with the men on it?

**A. Yes sir.**

Q. How many men did they usually carry out on that car?

A. Somewhere about 18 or 20 every morning.

Q. Do you know about what they were paying these men?

A. No sir, I don't have any idea.

Q. They were all first class men for the avocation they were following?

A. Yes sir.

Q. Which end of the "Y" would you go in?

A. I didn't have any certain end. I went in one end about as much as I did the other.

Q. The end you would go in to let the 6 pass—if you were there and got the empties out, the train load of passengers would wait on you with the shay engine to get the empties and get ahead of it didn't they?

A. Yes sir.

Q. If the empties were on the east side you would not go in west side at all?

A. I always—as a general thing the empties were left on the end and nearest the mill.

Q. They didn't care anything about getting the men out there and getting them to work by 6 o'clock, did they?

By Mr. BRADY: He has gone over that a half-dozen times, and how could he tell what the company cares, they give him his orders.

By the COURT: Proceed Mr. Dent.

141 Q. Go ahead and answer the question.

(Here the stenographer repeated the question.)

By the COURT: He don't know anything about that:—the objection is sustained. Let him tell what he knows, and let the jury draw their inference.

Q. Mr. McClendon, when were you summoned to court in this case?

A. I was summoned Tuesday morning.

Q. Last Tuesday?
A. Yes sir.
Q. You had the conversation before you were summoned?
A. Yes sir.
Q. How many men did you have in that conference?
A. I don't know, I never counted them, there were several in there.
Q. All in the same room?
A. Yes sir.
Q. All talking about it generally?
A. No sir, I don't know that they were.
Q. Discussing the case in a general way?
A. (No answer.)
Q. Was that the first time you had thought or talked about that accident out there——
A. Yes sir.
Q. You hadn't thought about it since that time, had you?
A. No sir.
Q. You hadn't thought about how you performed your services out there, had you?
A. No sir.
Q. Nobody had called your attention to it?
A. No sir.
Q. You know Mr. Burnham, don't you?
A. Yes sir.
Q. He worked for the Easterling Lumber Company on the same train you worked on?
142 A. No sir Mr. Burnham went there after I quit.
Q. And he knew about the rules and regulations, didn't he?

By Mr. BRADY: Wait a minute; it is not competent what Burnham knew.
Sustained. Exception.

Q. Do you know Mr. Tim Sears?
A. Yes sir.
Q. He worked there after you did, didn't he?
A. Yes sir.
Q. Do you know Mr. Barksdale Walker?
A. He worked there after I did.
Q. All these gentlemen worked there after you did?
A. Yes sir.
Q. What did you do there?
A. I run an engine.
Q. How long were you there?
A. Two years. I fired when I first went there until there was an opening on one of the engines.
Q. Did you know John Tatum?
A. Yes sir.
Q. What was he doing when you were there?
A. He was tongueing for the loader when I worked there.
Q. He wasn't an engineer, was he?

A. No sir.
Q. He didn't know anything about running an engine, did he?
A. Not that I know of.
Q. You don't know anything about who had the right of way when these trains collided, do you?
A. No sir.
Q. You don't know a thing about the facts and circumstances leading up to that?
A. No sir.
Q. You don't know what were the duties of the parties on either train do you?
143 A. No sir, no- at that time.

Redirect examination.

(By Mr. BRADY:)

Q. At this meeting Mr. Dent speaks about, I was present at that meeting, wasn't I?
A. Yes sir.
Q. I asked you what you knew about it, didn't I?
A. No sir.
Q. Did I attempt to influence your testimony in any way?
Objection. Overruled. Exception.
Q. You were just asked what you knew about it, weren't you?
A. Yes sir.
Q. And you stated what you knew about it?
A. Yes sir.
Q. Did Mr. Robert Dent ever interview you?
A. No sir.
Q. Did Mr. Ed Dent ever interview you?
A. No sir.
Q. Did Mr. Pierce ever interview you?
A. No sir.
Q. Was there any attempt or suggestion made to influence you about what you knew about this case?
A. Not at all.
Q. At the time you were running 6 and Mr. Pierce would transfer at this "Y" who was running Mr. Pierce's engine as his fireman?
A. His fireman, Claude Warren.
Q. So when Mr. Pierce was engineer on the Shay on Monday mornings, Claude Warren would bring the engine to the "Y" to get the empties?
144 A. Yes sir.
Q. Whose fireman brought the Shay down to get the empties at the time Mr. Pierce was engineer on the Shay?
A. Claude Warren.
Q. Where would he bring the engine to?
A. He would bring the Shay engine from the camps?
Q. Who was running the engine at that time?
A. Sam Pierce.

Q. What would Sam Pierce do with reference to that engine?
A. If the Shay hadn't been to the "Y" and moved the empties, he would take his engine at the "Y".
laration about

S. L. BISHOP (white) being called as a witness for the defendant, and being duly sworn, on oath testified as follows:

Direct examination.

By Mr. BRADY:

Q. Mr. Bishop are you employed by the Easterling Lumber Company now?
A. Yes sir.
Q. Were you in October, 1911?
A. Yes sir.
Q. Were you in the employ of the Easterling Lumber Co. at the time Mr. Pierce was injured?
A. Yes sir.
Q. What was Mr. Pierce doing at the time he was injured? How was he employed?
A. He was running an engine for the Easterling Lumber Co.
Q. What engine was that?
A. No. 5 the Shay engine.
Q. Was that before he was hurt, that he ran that Shay engine?
A. He was running No. 6 when he got hurt.
Q. The morning he got hurt he was running No. 6?
A. Yes sir.
145 Q. What engine had he been running before that?
A. No. 5 the Shay engine.
By Mr. DENT: Are you testifying from your own knowledge or from what you heard?
A. From my own knowledge.

(By Mr. BRADY:)

Q. You know this of your own knowledge then?
A. Yes sir.
Q. Where did Sam Pierce work before he took engine 6?
A. He ran No. 5.
Q. What were you doing then?
A. I was assistant wood saw foreman for the Easterling Lumber Company.
Q. You were assistant saw foreman in the woods?
A. Yes sir.
Q. Where were the empties left at the time Mr. Pierce was running the Shay?
A. At what——
Q. Where were the empty cars left at the time Mr. Pierce was running the Shay engine?
A. During the week there were left——
Q. I am not talking abou- the week—On Monday mornings—where were they left on Saturday evening?

A. Left at the south end of the "Y" the nearest end to Ora.

Q. Who went after the empties during the time Mr. Pierce was running the Shay, on Monday morning?

A. His fireman would always go after them.

Q. Who was his fireman?

A. Claude Warren.

Q. Where would Mr. Pierce be on Monday morning?

A. In Ora I suppose, he lived in Ora, and would leave there Saturday to come home and I wouldn't see him any more until Monday morning.

Q. How did he get back to the camps Monday mornings?

146 A. When he came back to the camps would he come on the Shay?

Q. That was the engine his fireman Claude Warren had taken out?

A. That is the engine he was running when he was running the Shay?

Q. Mr. Bishop when would these empties be put on the "Y"?

A. Saturday evening.

Q. What train would put them there?

A. The four.

Q. The four would put them there?

A. Yes sir.

Q. What would 4 do when they would put them there?

A. They would take the train of logs and bring them into Ora?

Q. Why were they left on the "Y"?

A. The Shay would generally come on into town, and bring the loader to be washed out, and when it would go back it would carry the loader back to the camps, and Monday morning——

Q. They would carry the loader back to the camps on Saturday night?

A. Yes sir.

Q. But they didn't carry the empties back on Saturday night?

A. No sir.

Q. Do you know why it didn't do it?

A. It would be late and when Mr. Pierce got hurt we were all in at a woodmen unveiling——

Q. As a general proposition why weren't these empties carried back Saturday night?

A. He would be late going back, and there were some large hills to go over and it would be to- heavy to carry the loader and empties too, so we would take the loader and come back and get the empties Monday morning.

Q. Who put that order in effect, that the empties would be left on the "Y"?

A. I don't know sir.

147 Q. You do know, however, that it was in effect?

A. Yes sir, I know they were left there.

Q. You know Mr. Pierce obeyed it?

A. Yes sir.

Q. Who had the right of way Monday morning when the empties were on the "Y"?

—. ——.

By Mr. DENT: Were you on the engine?
A. No sir.
Q. Were you there?
A. When the wreck was?
Q. Yes sir?
A. No sir.

By Mr. DENT: We ask that the witness be confined to what he knows.
By the COURT: Confine yourself to what you know.

(By Mr. BRADY:)

Q. Do you know what train had the right of way?
A. I know what the rule was, when Mr. Tatum would leave, he would leave orders for me——
Q. The general rule was—Under the general rule in effect at the time this man was hurt, which engine had the right of way on the "Y" on Monday mornings?
A. The Shay had it until it came there and got the empties and went back to the camp.
Q. Suppose the 6 came before it got the empties: who had the right of way the Shay or the 6?
A. The Shay would go after the empties and go to the camps before the 6.
Q. That always happened?
A. Yes sir.
By the COURT: You say the Shay always came there and got the empties and went back before No. 6 came out with the men?
A. It would come back part of the men stayed in town, and when the Shay came back, part of them would be on the Shay when
148 it got back.
Q. Which one got to the camps first?
A. The Shay.
Q. When the Shay went in with the empties, who went into *too* with the empties;—what did the men do;—the men that were on 6, if 6 got there when the Shay was there?
A. At the "Y"?
Q. Yes?
A. As I said I never went with them.
Q. What did you see them do? What happened when the Shay came in;—where would the men be?
A. You mean at the "Y" or camp.
Q. When they came into the camps?
A. Of course they would do different things. The men that lived in town did different jobs, and part of the loading crew stayed in town and would come out.
Q. What did these men do that worked in town?
A. Some of them drove teams, and some of them worked on the loaders, and some drove teams and some sawed for me.
Q. How many of them sawed?
A. I believe there were two or three sawed.

Q. You couldn't load any logs until the empties got there, could you?

A. No sir.

Q. If the men had beat the loading crew——

Objection; leading.

By the COURT: That is leading.

Q. All right I will change that question. What did you load logs onto?

A. Flat cars.

Q. They were called empty flat cars, weren't they?

A. Yes sir.

Q. What had to be gotten to the camps before you could load logs?

149 A. The loader would always be there and the empties had to.

Q. Could the loader crew do any work before the empties got there?

A. No sir, they could not.

Q. Are you sure that Mr. Pierce rode over the Shay engine with empties attached to it on Monday morning?

By Mr. DENT: Objection. Leading.

By the COURT: I think it is leading.

Q. State whether or not you are sure that Mr. Pierce rode the Shay carrying empties into the camp on Monday mornoings?

A. He did at the time he was running the Shay before he run the 6.

Cross-examination.

(By Mr. DENT:)

Q. Mr. Bishop where did you stay practically all the time?

A. At the camps—I lived in the camps but would come in town nearly every Saturday night.

Q. What is your occupation there?

A. Saw foreman.

Q. You are hired by the Easterling Lumber Co.?

A. Yes sir.

Q. What, if anything, does a saw foreman have to do with the schedule of the engines on the line?

A. Not anything to do with them on the line, only when Mr. Tatum would leave there Saturday night he would leave everything in my Charge until Monday morning.

Q. You say to this jury on your oath it was the general custom to run out and get those empties and get back to the camp before the 6 got there?

A. As I stated I never would go to the "Y" with the Shay, but the Shay would go over every Monday morning after the empties.

Q. That was the duty of the Shay to go over there and get those empties and get back before the 6 was due there?

150 A. I didn't say before it was due there. I said it was the duty to go over to the "Y" Monday morning and get the empties.

Q. Did they always leave empties at the "Y"?
A. They generally did.
Q. Are you willing to say on your oath that empties were always left there when you didn't see them at all?
A. When the loader——
Q. Answer my question—Are you willing to say on your oath to the jury, they went over there to the "Y" to get empties when you didn't see the "Y," and don't know whether there were left there?
A. No sir, I couldn't say. I wouldn't go with them over there after the empties. That was the only place they would have left the empties,—between there and five or six miles this side of there.
Q. You never had anything to do with the running of these cars did you?
A. Those engines?
Q. Yes sir?
A. I never run any of them.
Q. You were not the supervisor there were you?
A. No sir.
Q. You never run the engine there at all did you?
A. No sir.
Q. You don't know anything about that?
A. I am not an engineer; I don't know anything about running an engine.
Q. You remember the morning Mr. Pierce was hurt?
A. Yes sir.
Q. The Shay was late that morning?
A. I was there at the camps when it left. It left there at 10 minutes to 5 that morning.
Q. It left there 10 minutes late didn't it?
151 A. It left there 10 minutes before 5. They said they would leave a little early as they had to get some wood.
Q. It left 10 minutes before schedule time didn't it?
A. He went down the road and said he had to leave a little early, and drop down the yard to get some wood. It left the tank where it always stood and taken wood before it left.
Q. How long does it usually take the Shay to run to the "Y"?
A. I never counted it.
Q. How far is it?
A. I guess 2½ miles or something like that.
Q. You swear on your oath that the Shay left your camp on Monday morning that this accident happened at 10 minutes to 5 o'clock?
A. If I am not mistaken.
Q. And it only had 2½ miles to go to pick up those cars?
A. Yes sir, it had to go out and get wood, and go to Dry Creek and take water. That is the orders I gave them; they were out of wood and water.
Q. I thought Mr. Tatum gave the orders?
A. He would leave me Saturday night to give the orders Monday morning, as he couldn't get out there. He lived in town and I lived at the camps.

Q. You gave the orders that morning to that Shay—all the orders that were given?

A. Yes sir.

Q. The regular engineer did not run out did he?

A. No sir.

Q. And all the talk you had was with John Tatum and the fireman, wasn't it?

A. Yes sir.

Q. Tell the jury exactly what you told the fireman, and engineer? Tell us exactly what you told John Tatum and the man that fired that engine with him?

152 A. They were down at the "Y" and Claude Warren would go on up at the crossing, and it was nearly 5 o'clock, and they said they had to get wood and water, and I told them to go on to the "Y" for the empties.

Q. Tell whether you told them No. 6 was to leave 30 minutes earlier that morning, and go over that line to the camp?

A. How is that?

Q. (Here the question was repeated by the stenographer.)

A. No I didn't.

Q. You didn't tell them that?

A. No sir.

Q. And Sam pierce didn't know that order hadn't been given, of your own knowledge?

A. Not as I know of.

Q. You didn't tell John Tatum or Please Everett that Sam Pierce on No. 6 had been ordered out thirty minutes earlier, and to be on the watchout for him?

A. No sir.

Q. You didn't tell him that?

A. No sir.

Q. How long was it afterwards that you heard of the wreck?

A. It was a little after 6 o'clock, I can't say just exactly what time. I heard the wreck whistle, and didn't know then the engines ran together. I just thought it was a wreck, and got up a crew of negores there at the camp and started——

Q. You say it has always been the custom for the Shay to go to the "Y" and get the empties, and go back to the camp before the arrival of No. 6 didn't you?

A. Yes sir, before the——

Q. How long would it be at the camps, usually before the arrival of 6 there at the camps?

A. Some times they would come right in together,—one right in sight of the other. When Mr. Pierce was running, he would
153 come back on the Shay when he was running, and 6 would follow it on back.

Q. And you are absolutely certain you didn't give the fireman or engineer—And you gave them all the orders that was given that morning?

A. Yes sir.

Q. That Sam Pierce was ordered to run 30 minutes earlier from the mill to the camps?

A. No sir.

Q. There was nobody else at the camp to give them that order, was there?

A. Not that morning.

Q. There was no way to get them information out there, was there?

A. No sir.

Q. When did Mr. Tatum tell you to give those orders?

A. It had been the custom of him to leave the engine in my charge ever since we had been out there—We had been out there several months——

Q. When did he tell you to give those orders?

A. When he first moved out there.

Q. Then you gave all the orders from that end of the line?

A. Only from the time he left Saturday night until the time he came back Monday morning.

Q. And he didn't tell you he was going to move up the time of Sam Pierce's engine No. 6 30 minutes, did he?

A. No sir.

Q. And he was the Superintendent of the line, wasn't he?

A. Yes sir.

Q. He didn't advise you and you didn't advise the people in charge of that engine that there had been a change of thirty minutes in the schedule of engine No. 6, did he?

A. No sir.

Q. Now, Mr. Bishop, the people that are carried from Ora out to the Camp where the people work, are carried out there for the
154 purpose of being put to work aren't they?

A. Yes sir.

Q. You don't know whether the empties were left on the "Y" or not of your own knowledge?

A. Part of the time—That morning—I couldn't say—That morning I could, for I was——

Q. Tell us how you know that?

A. We were all in here at an unveiling—they unveiled a monument. I know your brother made a speech for us.

Q. And those cars were put in there Sunday evening weren't they, after you rode out to the unveiling of the monument?

A. Yes sir—they were—We went out on Sunday evening—we carried the loader from town, and carried the loader out Sunday evening.

Q. When were those empties put there?

A. Saturday night.

Q. Who put them there?

A. I couldn't say I suppose the 4 put them there.

Q. How did you know they were put there Sunday evening?

A. I didn't say they were put there Sunday evening we carried the loader out Sunday evening.

Q. Were any of those cars used on Sunday?

A. If they were used I don't know it.

Q. You say the cars were always put on the side next to Ora, how do you know that?

A. If they put them in at the other end——

Q. State to the jury how you know, and you were not there?

A. All of the times I have ever been there when they were put in, the 4 would pull them out from Ora and set them in there, and turn and get its loads.

Q. How would you set them in on the east side of the "Y" when the empties were behind you?

A. Four would go, and the Shay would bring the loads over first and back the loads up the far end of the "Y" on the tail end
155 of the "Y", then the Shay would come back down and stay in a hole on this end of the "Y" and the four would go on through and leave its empties on the main line, and go around and pick its load, and the Shay would go down and get on the empties and come around and set them in.

Q. Did you ever come from the camps with the Shay to pick up those empty cars?

A. Yes sir.

Q. How many mornings?

A. I never come every morning.

Q. You never come every morning?

A. How I knew they would pick them up, I came to town every week, and that is the only way they could do it.

Q. The empties were pushed in on the east end of the "Y"?

A. Yes sir, when the 4 would come there.

Q. Leave out the 4, nothing has to do with the 4, the Shay and the 6 are the ones that collided, that was anywhere about the wreck, was it?

A. The wreck was right here.

Q. Right on the main line where the "Y" is built out there, isn't it? (Indicating.)

A. Yes, sir.

Q. Sam Pierce couldn't have run on the East end without having run into the empties, could he?

A. No sir.

Q. He could not possibly have put his people and this car on the east track without running into the empties?

A. He could have easily have come in slow.

Q. How many cars were there?

A. Ten. That is what they usually have there—I don't know how many were there then.

Q. How many cars could you put on the track?

A. 75 or a hundred.

156 Q. He couldn't get on the east end without stopping and pushing in there?

A. The switch was always lined for the main line.

Q. Now, then, all the Shay would have to have done to give Mr. Pierce the right of way that morning or let him pass up here (indicating) was not to come down the west side of the track, was it?

A. Yes, but——

Q. The Shay had passed down the main line of the "Y" one-third when the wreck occurred?

A. Yes sir.

Q. They were going to force Mr. Pierce's engine to push those empty cars in there, weren't they?

A. Mr. Pierce stopped right here on the main line; the Shay pulled in here and headed there and backed back; and Mr. Pierce stopped up here—(indicating).

Q. Then it was the duty of the Shay to come up there and push in there, and let Mr. Pierce by wasn't it? (Indicating.)

A. The 6 would have stopped here, and the shay come up this line and got its empties and backed on back that line to the camp (indicating).

Q. Where did the 6 spot wait when it waited for the Shay to come out and get those cars off that track?

A. I couldn't say.

Q. Didn't you say it was to wait east of the "Y"? Didn't you tell Mr. Brady the 6 spot was to wait east of the "Y"?

A. The Shay would come over and get the empties, and it had no other place to pass.

Q. The Shay would always come back before the 6 and get to the camps before the 6?

A. Monday morning it would always bring the loading crew with it on the Shay, and I knew it met the 6 some place over there, and they had no other place to meet it except the "Y" unless it was 5 or 6 miles this side.

157 & 158 Q. And you are absolutely certain that is the only place they could pass on that line?

A. There were other setout tracks this side of there.

Q. Now, you say Pierce's engine didn't have the right of way? before Pierce could have gone on woth these men, he would have had to keep them waiting on the main line, or push them in on the side track, if he pushed these cars on the side track how would the Shay have gotten them off the track?

A. It would have blocked the Shay.

Q. If his duty was to go in on the "Y" and side track how could he have gotten them out?

A. I didn't say it was his duty to go in on the "Y". If he had stopped here—(indicating); the Shay had the right of way to here. (Indicating.)

Q. And he would have had to wait until he got these cars together and switched together, and Mr. Pierce would have to wait some distance before he got to the "Y"?

A. About the length of ten cars and the engine.

Q. He would have had to waited east of that "Y" wouldn't he?

A. Yes sir.

Q. Your testimony with reference to that part is largely from hearsay, isn't it? You don't know of your own knowledge what he would have to do there, do you?

A. All the times that I went, and the empties were left there, he would have had to waited this side and the Shay go in and get them———

Q. And pull them out that way?

A. That is the only way he could pull them out.

Q. He would have had to pull in there and hold those men, and let the Shay pull in and get its cars and pull out——
A. Yes sir.
Q. All the empties were not kept in the "Y", were they; some of them were kept at the camp, weren't they?
A. The regular trains of empties;—one was kept at town and one at the "Y".
159 A. You mean if the empties were still at the "Y"?
Q. Yes?
A. To wait there until the Shay taken them out.

By Mr. DENT:

Q. Just going to start that train out 30 minutes ahead of time for the purpose of letting it stand there at the "Y" for the Shay to pass; is that right?

By Mr. BRADY: We object:

By Mr. DENT: I withdraw the question.

Recross-examination.

(By Mr. DENT:)

Q. I believe you say Mr. Tatum was the train master and general superintendent of the railroad?
A. Of the woods.
Q. And of the railroad?
A. Yes sir.

G. S. STANFORD, (White), being called as a witness by the defendant, and being duly sworn, on oath, testified as follows:

Direct examination.

(By Mr. BRADY:)

Q. Mr. Stanford, what company are you in the employment of?
A. Easterling Lumber Company.
Q. How long have you been in the employment of that company?
A. About 27 months.
Q. Were you in the employment of the Easterling Lumber Company in October 1911?
A. Yes sir.
Q. What were you doing for the Easterling Lumber Company?
A. Laying steel and grading for them.
Q. What train did you have charge of?
A. The 6 spot.
160 Q. Who was the engineer on that train?
A. We had three different engineers what time I was there: Sam Pierce, and John McClendon and Will McClendon.
Q. Who was the engineer at the time of this accident?
A. Sam Pierce.
Q. How long had he been running before that?
A. He had been about six weeks on it the best I can remember.

Q. What had he done? What work had he been doing with that train?

A. He had been laying steel and taking up steel, and I think he hauled logs a day and a half.

Q. And the balance of the time on the 6 he layed steel and took up steel?

A. Yes sir.

Q. Who had charge of the train laying steel and taking up steel?

A. Me.

Q. You had charge of the train?

A. Yes sir.

Q. Do you know where the empties were left on Saturday evenings?

A. At the new "Y."

Q. Is that where this accident happened?

A. Yes sir.

Q. At which end of it—the end away from Ora or next to it?

A. The end next to Ora—the south end.

Q. Who had the right of way at the time of this accident on the "Y"?

A. The Shay had the right of way when empties were there.

Q. What was the duty of the 6 to do before it reached the "Y" of the empties were on the "Y"?

A. Supposed to stop there until he found out where the 5-spot was.

Q. What engine had Mr. Pierce run before he run the 6?

A. He run the 5-spot first.

161 Q. Do you know whether or not he ever stopped at this "Y" to wait for the Shay engine, or the 5-spot while he was running the 6?

A. Yes sir, we have stopped.

Q. He did stop there for it?

A. Yes sir.

Q. State whether or not there was any other order issued that gave the 6 spot the right of way over the "Y"?

A. I don't know.

Q. Before the empties were taken away?

A. We had orders to stay out of the way of logs trains while we were laying steel.

Q. On Monday mornings what were your orders?

By Mr. DENT: Do you know of your own knowledge?

A. Just what I know——

Q. What were your orders on Monday morning?

A. We were to carry the men to the camp; providing the empties were on the "Y," and they transferred there and the men transferred to the Shay, all except my gang.

Q. And the engine stopped and the men transferred to the Shay?

A. Yes sir, all except my gang.

Q. If the empties were on this track on Monday morning what was the duty of the 6-spot to do?

A. We were supposed to stay there until we heard from the 5-spot.

Q. What was done when the 5-spot got there with the men that rode on the 6, if anything?

A. They transferred on the 5 and went on out to load the logs, to the end of the road.

Q. If the empties were gone how did you proceed across the "Y"?

A. We would go along and listen for the 5-spot, and sometimes I would get off and walk over the hill to the old "Y."

Q. Under the rules did he have a right to proceed at all if the empties were on the "Y"?

162 A. We had to stop there and find out where the 5 was.

Q. Do you know the time this train left Ora on this morning of the accident?

A. I don't know just the minute, I know we had orders to leave about a quarter to five.

Q. What time were you to report at the mill?

A. 15 after 5.

Q. Was that the leaving or reporting time?

A. It was supposed to be the leaving time.

Q. You had to get there earlier than that?

A. I always got there about 5 or a minute to 5.

Q. Suppose you had left the mill at 4 o'clock or at 4:30 or 4:35, if the empties were in the "Y," what was the duty of the 6 to do?

A. We were to stop there until we found out where the 5 was, without Mr. Will Tatum told us to go ahead.

Q. Did he tell you that morning?

A. Yes sir.

Q. You had charge of the train and was the conductor or the man who stood in place of the conductor?

A. Yes sir.

Q. Were the empties in the "Y" the morning of the accident?

A. Yes sir.

Q. Mr. Pierce ran by those empties didn't he?

A. Yes sir.

Q. Was there anything to have hindered him from seeing them?

A. Not that I know of.

Q. You saw them didn't you?

A. Yes sir.

Q. Did you see them?

A. I did after he got half way down the hill?

Q. Whose duty was it to look out to see if those empties were on the "Y" or not?

163 A. The man running the train I suppose.

Q. Who was the man on that occasion?

A. Mr. Sam Pierce.

Q. If Mr. Pierce had looked out and seen those cars before he got to the "Y" there was nothing to have hindered him from stopping was there?

A. No sir.

Q. Did you ever know of him to transfer from the 6 and ride the Shay in?

A. Yes sir.

Q. Did you ever see him transfer from engine 6 and ride the Shay in with the men?

A. Yes sir.

By Mr. DENT: Objection, leading.

Sustained.

Q. What did the men do when they went in on 6 and found the Shay standing there at the "Y" with the empties?

A. They all transferred and got on the 5-spot except my gang of negroes.

Q. Did you ever see that—was Mr. Pierce an engineer at any time that that was done or was he not?

A. I don't remember whether he was or not.

Q. State whether or not Mr. Pierce ever rode out on 6 when you were on 6?

A. He did, yes sir.

Q. State whether or not he ever rode out on 6 when you were on 6 at the time you were running the Shay?

A. Yes sir.

Q. State whether or not he ever met the—the shay ever met the 6-spot when he was on the 6-spot at the "Y"?

A. Yes sir.

Q. State what he did when he met them?

164 A. He got off the 6-spot when he ran the 5 and got on it and went to the camp.

Q. Who did he carry with him?

A. He carried the loading crew, and log sawyers, and such as that.

Cross-examination.

(By Mr. DENT:)

Q. What is your name?

A. G. S. Sanford.

Q. What was your occupation at that time?

A. Laying steel and grading.

Q. Were you one of the hands or not?

A. I worked for the Easterling Lumber Company, yes sir.

Q. Were you the foreman?

A. Yes sir.

Q. Wasn't Mr. Will Tatum on that train?

A. The 6-spot?

Q. Yes sir.

A. Yes sir.

Q. He was on the engine with Mr. Pierce, wasn't he?

A. On the flat car.

Q. How far was he from him?

A. One car length.

Q. He is the man that gave the orders to run that train? Wasn't he?

A. Yes sir.

Q. You had your arm broken in the wreck didn't you?

A. Yes sir.

Q. And they paid you for it didn't they?

A. No sir, they hav-n't paid me yet for it.

Q. Did you come to Mr. Ed Dent's office in town of Collins?

A. Yes sir.

165 Q. Did you state to him in his office—did you make one or two trips there?

A. One.

Q. You came there to his office once when he wasn't there, didn't you?

A. No sir.

Q. You didn't do that?

A. No sir.

Q. Didn't you come there for the purpose of getting him to sue the Easterling Lumber Company at that time, and didn't you tell him then and there that——

By Mr. BRADY: We object.

Here the jury retired from the room, and the following proceedings were had in their absence:

By Mr. BRADY: The defendant, the Easterling Lumber Company asks the right to advise Mr. Stanford that you have a right to decline to answer any questions that went on between you and Mr. Dent, whom you were seeking to employ as your attorney, on the ground that whatever goes on between a client and his attorney, is confidential and professional.

By the COURT: I think it is a privileged communication.

By the COURT: I say to the witness on the stand that if the lawyer interrogates you about a matter that was of your own concern between you and Mr. Dent, you don't have to answer it unless you want to, because any communication you had with the lawyer about your matter was a privileged communication, and you don't have to answer it unless you want to.

166 By Mr. DENT: Do you desire to invoke the privilege, sir?

A. Yes sir.

By Mr. DENT: We except to the ruling of the court and insist that the witness be required to answer. Whether or not he did have any conversation in his office, when he and Mr. Dent were present, and if he didn't detail to him the facts in this case, and stated there the wreck was caused by the way the Shay engine was run.

By the COURT: He can testify to anything he told him about this accident that happened to this man.

A. I didn't tell Mr. Dent how it happened. I asked him for information, and he gave it to me, and I left his office.

By the COURT: Were you asking about yourself or about this man that got hurt?

A. About myself. I only went to see him for information. I don't understand the laws of Mississippi.

By Mr. DENT: We except to the ruling of the court in that particular.

By the COURT: The witness may make any statement he made to

Mr. Dent or any — else freely and voluntarily about this accident that brought about the injury to this plaintiff.

Examination.

(By Mr. DENT:)

Q. I believe you came to my office and you had your arm tied up, didn't you?

A. Yes sir.

Q. You were talking about being injured by the Company in this wreck; that is, you and Sam Pierce, and you mentioned some lady?

A. You asked me if there wasn't a lady on the engine and I told you there was.

167 Q. What did you come in my office for?

A. I came up there to get information from you;—to see if there was anything in it for me, and you told me there was not, and you said I could get more out of it than you could. You said "You could get more out of it than I could," and you didn't think it would pay me to sue.

Q. Didn't you tell me there was a job open for you to build a railroad there?

A. No sir, not at that time.

Q. And if they would pay you for it and give you that job, you wouldn't sue them?

A. No sir.

Q. And didn't I tell you to go up there and see if these people wouldn't settle with you?

A. No sir, you just said "You could get more out of it than I could."

Q. And that Sam Pierce had the right of way over the road that morning?

A. If I did I don't remember it—of telling you the 6-spot had the right to the "Y."

Q. Will you swear you didn't tell me that morning that Mr. Sam Pierce didn't have the right of way over the Shay engine that morning?

A. No sir, I didn't tell you that.

Q. When your arm was tied up?

A. No sir. The Shay engine had the right of way from everywhere. I have laid in the hole for a half day at a time with 15 men, to find out where the log train was.

Q. You deny telling me Sam Pierce didn't have the right of way that morning?

A. Yes sir, if you say I did, I deny it.

By Mr. BRADY: The defendant objects to the introduction of any of the testimony taken in the absence of the jury, or any questions propounded to the plaintiff's attorney to be propounded in

168 the absence of the jury, for the reason that the testimony shows that this witness came to see Mr. Dent professionally, and came to see Mr. Dent at a time when he thought of sueing the

Defendant, the Easterling Lumber Company, and that any statements made between them with reference to how this accident occurred, what caused his injury are privileged communications, and the witness himself has invoked that privilege.

By the COURT: I don't think it is competent for him to ask him if he came there to employ him; but I think it is competent for him to ask if he made statements to Mr. Dent in regard to the accident in which this man got hurt; and I think he can ask him all about the statements he did make to him as to which one had the right of way and how the accident occurred.

By Mr. BRADY: At the time he was seeking to employ him?

By the COURT: I think so.

Defendant excepts.

By Mr. ED. DENT: We will let him stand aside.

Here the jury returned into the Court room, and the following proceedings were had in their presence.

(By Mr. DENT resuming:)

Q. I believe you have stated you had your arm broken, and they haven't paid you yet?

Objection.

By the COURT: The objection is sustained, and the answer is excluded, and the jury will not consider it.

169 Q. What part of the train was you on?

A. I was on a flat car.

Q. Where was Mr. Tatum?

A. About middle ways of the flat car.

Q. How far from Mr. Pierce?

A. About 30 feet.

Q. Was he riding with Mr. Pierce any that morning?

A. I don't know.

Q. He wasn't talking with you was he?

A. Yes sir, he was talking with me when we struck.

Q. Mr. Pierce was badly hurt wasn't he?

A. Yes sir.

Q. Did you see him when he was swinging between the engine and tender there?

A. No sir.

Q. You saw him when he got on the ground?

A. Yes sir.

Q. To whom were the orders given with reference to running that train?

A. They were given to me and the engineerman.

Q. Given to you together.

A. We would just walk up and tell me what he wanted done?

Q. You had started to the camps that morning hadn't you?

A. I had started to the end of the road to lay steel.

Q. You were going out past the camps?

A. Yes sir.

Q. The foreman was with you wasn't he?

A. Yes sir.

Q. Had he said anything to Mr. Pierce that morning?
A. No sir, not that I know of?
Q. He hadn't given him any orders so far as you know, as to where the 6-spot was?
A. We were on the 6.
170 Q. The schedule for the 6 had been changed hadn't it?
A. No sir, not that I know of,—the leaving time from the mill?
Q. Yes.
A. It had for two weeks. They changed two weeks before then. It had been leavin*f* at 5:30, and he wanted us to leave a quarter after 5.
Q. Didn't it leave a quarter after five that morning?
A. I don't remember; I didn't look at my watch.
Q. If it had been changed 30 minutes, you don't know anything about it, do you?
A. I knew it had been changed 15 minutes.
Q. Had it been changed 30 minutes?
A. 15 minutes.
Q. If it had been changed 30 minutes instead of 15, you don't know anything about it?
A. I knew it had been changed 15 minutes.
Q. Do you know it had been changed to 30 minutes earlier?
A. No sir.
Q. You don't know whether he was to leave at 5 instead of 5:30?
A. I knew he was to leave there a quarter after 5.
Q. You don't know Mr. Tatum had said to the man that worked at the shop there—Mr. T. M. Sears:—You don't know he said to Mr. Sears he wanted him to start that train out at 5 o'clock?
A. No sir.

Objection.

Q. If any orders of that kind were given you didn't know anything about it, did you?
A. No sir.
Q. You didn't hear any orders about getting out to the camp so the men might go to work at 6?
A. Yes sir, we were supposed to get there at 6 o'clock.
171 Q. Supposed to get to the camp at 6; is that right?
A. Yes sir.
Q. What time did this wreck occur?
A. About three minutes after 6.
Q. Do you know Mr. Jim Sasser?
A. Yes sir.
Q. Did you tell Mr. J. W. Sasser in Mr. Dent's office, that Mr. Pierce had the right of way there, and this wreck was caused by the negligence of the parties that were running the Shay engine in the presence of Mr. E. L. Dent and in the presence of Mr. Sasser?
A. No sir.
Q. At the time you were at his office for the purpose of hiring him to prosecute your suit?

By Mr. BRADY: We object to any statement——
By the COURT: I sustain that.

Q. Do you know Mr. Jim Burnham?
A. I don't know. I know a couple of Burnhams. I don't know Mr. Jim Burnham,—if I did I have forgotten it.
Q. Do you know he was an engineer that Ran with the Easterling Lumber Company in September, 1911?
A. I think I remember him;—I don't know his name, but I think I know the man you are speaking of.
Q. Did you ever run with him while he was running the engines there?
A. No sir.
Q. Do you know Mr. Guss Moore?
A. Yes sir.
Q. Are you in the employment of the Easterling Lumber Co.?
A. Yes sir.
Q. Were you at the conference held at the Easterling Lumber Company's office on Tuesday or Wednesday of this week?
172 A. Yes sir.

Objection.

Q. Was this case discussed there?

By Mr. BRADY: I have a right to interview my witnesses.
By the COURT: I always hear those questions asked: "Have you ever talked to anybody about this suit"—"Did you have a conversation with so ans so." Yes, and they will go on and ask a number of questions, and turn it over to the other side, and opens up the question Mr. Brady went into this morning—"Was there anybody tried to influence you unduly," "Did anybody try to persuade you to tell anything that was wrong?"
I am going to sustain the objection to this question because both sides have a perfect right to interview their witnesses, and find out what the truth is, and the other side has no right to ask questions on that.

Q. Didn't you discuss th-roughly and go into this case, all of you together?
A. I went in there myself.

By the COURT: He need not answer that.

Q. Where do you spend most of your time?
A. Where do you mean?
Q. Where do you stay up there?
A. At Ora.
Q. Are you a man of family?
A. Yes sir.
Q. You are still working for the Easterling Lumber Company?
A. Yes sir.
Q. Who was running the Shay engine that morning?
A. John Tatum.
173 Q. Who was the fireman?
A. Mr. Everett.

Q. Are you sure about that?
A. I am sure he was firing that morning; yes sir.
Q. They are both here, are they?
A. Yes sir, I don't know who the regular fireman was; he was firing that morning.
Q. Who was the regular engineer?
A. Claude Warren.
Q. That train was not run out by the regular engineer?
A. No sir.
Q. You don't know anything about how the empties were placed on that "Y;"—you had nothing to do with it or supervision over it?
A. No sir.
Q. You didn't know what trains had the right of way there, did you—you were not running any trains?
A. I was supposed to keep out of the way of the log train with the 6.
Q. You don't know of your own knowledge who had the right of way there?
A. I just know the orders that Tatum gave.
Q. You don't know whether Tatum gave any orders to the parties running that train, do you?
A. I know he gave me orders.
Q. You don't know what orders were given Mr. Pierce?
A. No sir.
Q. You don't know what orders were given from the West end of that line, do you?
A. No sir.
Q. You don't know on your oath, who had the right of way?
A. I can't say we didn't have the right of way if the empties —
174 standing in the hole, because we were looking for the 5-spot to come after them.
Q. How often did you get out that way?
A. Every day.
Q. You don't know what orders had been given the Shay?
A. No sir.
Q. You can't say on your oath what train had the right of way, can you?

By Mr. BRADY: That witness has answered that 3 or 4 times.
By the COURT: The objection is sustained for that reason.

CLAUD WARREN (white), being called as a witness for the defendant, and being duly sworn, on oath testified as follows:

Direct examination.

(By Mr. BRADY:)

Q. Mr. Warren, you are employed by the Easterling Lumber Company?
A. Yes sir.
Q. Mr. Warren, were you employed by the Easterling Lumber Company in October, 1911?

A. Yes sir.
Q. You were a fireman on a Shay engine?
A. Yes sir.
Q. Who was the engineer at that time?
A. John Tatum was engineer when I started on it.
Q. Who was the next engineer?
A. Sam Pierce.
Q. What did you do towards moving empty cars on Monday morning when Mr. Sam Pierce was engineer?
A. I went to the "Y" after them.
Q. You went from where to the "Y"?
A. I went from the camp to the "Y."
Q. Where would you meet Mr. Pierce?
A. At the "Y".
175 Q. What train would he come to the "Y" on?
A. He came on 6.
Q. What would he do when he got in on 6 to the "Y"?
A. He would get off and get on his engine.
Q. What would the men do that were on 6?
A. When we got to the empties and went back, the 6 came on.
Q. Would the men ever transfer from the 6 to the Shay?
A. Not that I know of.
Q. You were the fireman on the "Shay" at the time Mr. Pierce was the engineer?
A. Yes sir.
Q. How came you to take the engine down to the "Y" on Monday *n*ornings?
A. Mr. Pierce went to town every Saturday night, and I carried the engine over there to meet him.
Q. Why did you do that?
A. I had to go after the empties.
Q. Who told you to do it?
A. Mr. Tatum.
Q. Mr. Tatum told you to meet Mr. Pierce with the Shay engine?
A. Yes sir.
Q. Was Mr. Pierce you- engineer?
A. Yes sir.
Q. When he left on Saturday night would he know you were going to meet him, or not?
A. Yes sir, I reckon so.

Objection. Sustained.

Q. Would you meet him or not?
A. We met him every Monday morning over there.
Q. If the 6 got there before you left what would Mr. Pierce always do?
176 A. We generally always waited for him there until the 6 got there.
Q. Then what would Mr. Pierce do?
A. He would get on his engine.
Q. Was that the Shay engine?

A. Yes sir.
Q. That was the engine you were on?
A. Yes sir.
Q. You didn't see the wreck the morninf it occurred?
A. No sir.
Q. You were the regular engineer the-, but you weren't running?
A. Yes sir.
Q. Which engine had the right of way at that time over the "Y"?
A. The Shay had it.
Q. On ever- Monday morning?
A. On every Monday morning.

Cross-examination.

(By Mr. DENT:)

Q. Are you still working for the Easterling Lumber Company?
A. Yes sir.
Q. How many days were you laid off for not going out on the Shay the morning this accident happened?
A. About 20 or 25 days.
Q. You were laid off 20 or 25 days for not going out on that train that morning, weren't you?
A. Yes sir.
Q. How late did the train start from the camp?
A. How is that?
Q. In the first place who laid you off?
A. Mr. Tatum.
177 Q. Will Tatum?
A. Yes sir.
Q. How late did the Shay engine start from the camp that morning?
A. It left there at 5 o'clock.
Q. Do you know?
A. No, I don't know, I hadn't never got up.
Q. You didn't get up at all?
A. No sir.
Q. Did you give any orders how the Shay should be run that morning?
A. Yes sir.
Q. Who did you give them to?
A. John Tatum.
Q. What did you tell him?
A. I told him to go over to the "Y" after the empties.
Q. When was John Tatum notified you were sick and would not go?
A. That night.
Q. Are you sure about that?
A. Yes sir.
Q. What time that night?
A. When we quit work.
Q. The day before the accident was Sunday, wasn't it; you don't work on Sunday, do you?

A. It was Saturday evening.

Q. Which was it? Was it Saturday or Sunday? You weren't sick Saturday. You were working Saturday, weren't you—you expected to be well by Monday morning, didn't you?

A. (No answer.)

Q. Didn't you Mr. Warren?

A. Yes sir.

Q. You didn't know whether you would get out on that Shay that Monday morning or not, did you?

178 A. No sir.

Q. You didn't go did you?

A. No sir.

Q. And that engine you should have been on was the one that ran against this engine and cut Sam Pierce's leg off, wasn't it?

Objection. Overruled. Exception.

Q. Did that hurt his leg, I will say—that was the same engine wasn't it?

A. Yes sir.

Q. And you were laid off for it?

A. Yes sir, I was laid off.

Q. Now, then, Mr. Warren, when did you last have a talk with Mr. Will Tatum—when did you last have a talk with him before you ran that engine out?

A. It was Saturday.

Q. You told the jury awhile ago it was the morning before this accident happened. Mr. Warren, this is a serious matter. Won't you refresh your memory and tell us the best you can——

By Mr. BRADY: Objection.

By Mr. DENT: I withdraw the question.

Q. Now tell us which it was?

A. (Witness pauses.)

Q. I want you to tell me the last talk you had with John Tatum, the man who ran the Shay engine out, was — on Saturday night or Sunday night?

A. I don't know whether it was Saturday night or Sunday night.

Q. You were sick Saturday night?

179 A. No.

Q. You didn't know but what you were going out Monday, did you?

A. No sir.

Q. You didn't have any talk with him Saturday about running this Shay engine out, did you?

A. I don't know whether it was Saturday or Sunday. I gave him orders to go out after the empties.

Q. When was that?

By Mr. BRADY: He just stated he didn't know whether it was Saturday or Sunday.

By the COURT: Tell him when it was—Saturday or Sunday, if you know.

A. I don't know.

Q. Did you tell him the morning you went out from the camps—the morning the accident occurred, before he left that morning?

A. No sir.

Q. Were you called that morning?

A. No sir, I wasn't called.

Q. Are you sure about that?

A. Yes sir.

Q. You don't know whether the Shay left on time or not, do you?

A. No sir, I couldn't swear when it left.

Q. Just what did you tell John Tatum. Tell the jury everything you told John Tatum?

A. I just told him to go over there and get the empties.

Q. Is that all you told him?

A. Yes sir.

Q. You didn't tell him about the running of any other train?

A. He asked me about 6 and I told him the Shay had the right of way from the Camp to the "Y."

180 Q. Had you received an- notice at all that the schedule of 6 had been changed from 5:30 to 5 o'clock? You didn't receive any notice of that did you?

A. They had been getting out there late and Mr. Tatum told the 6 to leave there at 5 o clock.

Q. Your duty was to get out there and get those empties and get back to the camp before 6 came, wasn't it?

A. No sir he never said anything about that.

Q. Wasn't that your duties? I am asking you what your duties are?

By the COURT: Answer the question. What were your duties.

A. He just gave me orders to go after the empties.

Q. He didn t tell you what time to run on, or anything about it, did he?

A. No sir.

Q. He didn't tell you what time 6 was to be there?

A. No sir, he just told me to go and get the empties.

Q. He didn't tell you the time of 6 had been changed?

A. He told me 6 would meet me at the "Y."

Q. When did he tell you that?

A. Saturday evening, when we went in and washed out.

Q. You didn't say anything to Mr. John Tatum about what Mr. Will Tatum had said to you, had you?

A. No, I don't know as I did.

Q. You gave him what orders?

A. To go to the "Y."

Q. And you didn't tell him anything about any other train?

A. I told him -he Shay had the right of way to the "Y."

Q. The "Y" is an attachment to the main line, isn't it?

A. Yes sir.

Q. The west side of the "Y" is the one towards the Camp, isn't it?

181 A. I don't know whether it is west or not?
Q. It is towards sunset isn't it?
A. Yes sir.
Q. He had the right of way to there didn't he?
A. The Shay had the right of way to the end towards town.
Q. O-, I see—you told the jury, didn't you, that the Shay had the right of way to the "Y," didn't you?
A. I said they had the right of way to the end next to town.
Q. That is what you say now. Is that right?
A. That is right.
Q. Now, Mr. Bishop out there give his orders too, didn't he?
A. He didn't give any that morning.
Q. He didn't give any that morning to this crew at all?
A. He didn't give me none. I don't know about the rest of them.
Q. He hasn't offered to give orders to anybody, ha- he?
A. He is the assistant Superintendent.
Q. Then Tatum gave the orders from that end of the line? The Assistant Superintendent had nothing to do with giving orders from that end of the line?
A. He never gave me none. I don't know what kind of orders he gave.
Q. Do you know Mr. Jim Burnham?
A. Yes sir.
Q. He was an engineer there, wasn't he?
A. Yes sir, he run a while there.
Q. State whether or not you know of your own knowledge whether he was familiar with the rules and regulations of the company there at that time?

By Mr. BRADY: We object, he has testified about it himself.

By the COURT:

Q. Do you know whether or not he was familiar with the rules and regulations of the company?
A. No sir, I don't.
Q. Was it 5:15 or 5:30 that 6 was to leave Ora?

182 By Mr. BRADY: He has gone over that.
By the COURT: Let him answer it.

By Mr. BRADY: I have made the statement he asked him if — knew when the train left Ora, and that witness told him that Mr. Tatum told him that they would not get there on time, and he had ordered engine 6 to leave at 5. I have made the statement that Mr. Dent said that and Mr. Dent has disputed that, and I have the right to appeal to the record, and I do appeal to the record.

By the COURT: I will let the witness answer the question again.

Q. (Here the stenographer repeated the question.)

By Mr. BRADY: The defendant objects for the specific reason that the witness has told the attorney that he had known this train was to leave at 5 o'clock and this supposes something that the witness has already stated.

By the COURT:

Q. Do you know whether——
A. Before the schedule was changed——
By Mr. DENT: Mr. Warren the schedules were changed right about the time of the accident wasn't it?
A. Yes sir.
Q. And the morning of the accident No. 6 was to run out from Ora 30 minutes earlier, wasn't it?

By Mr. BRADY: We object for the reason the witness could not know when the train was run out from Ora, because he was sick in the camps.

By the COURT: Do you know?
A. No sir, I don't know.
Q. Do you know whether the schedule was changed?
183 A. Mr. Tatum said it was due to leave town at 5 o'clock.
Q. But you say you didn't tell that to John Tatum who ran the Shay out,—that the 6 was to leave 30 minutes earlier?
A. No sir.

By Mr. BRADY:

Q. But you did tell him—What did you tell him with reference to who had the right of way over the "Y"?
A. I told him the Shay had the right of way.

FRANK EVERETT, (White), being called as a witness by the defendant, and being duly swor-, on oath, testified as follows:

Direct examination.

(By Mr. BRADY:)

Q. Mr. Everett, you have been sworn, have you?
A. Yes sir.
Q. You are at work for the Easterling Lumber Company, now, are you?
A. Yes sir.
Q. What are you doing now, Mr. Everett?
A. Loading logs.
Q. What were you doing in October, 1911?
A. I was loading logs up there for the Lumber Company.
Q. Were you on the train the morning of the accident?
A. Yes sir.
Q. What car were you riding on?
A. I was riding on the car behind the 6 spot.
Q. Do you know whether Mr. Pierce was an engineer on the Shay at one time?
A. Yes sir, he was running the Shay for a while before he taken sick?
Q. Do you know where the empties during the time he
184 was engineer on the Shay were placed on Saturday night?
A. They were placed at the south end of the "Y".

Q. Where, with reference to Ora? Furtherest away from it or nearest to it?

A. Nearest to it.

Q. And that is where they were placed during the time he was engineer?

A. Yes sir.

Q. Who was his foreman?

A. When he was running the 6?

Q. No sir, before?

A. When he was running the Shay it was Claude Warren.

Q. Where was the meeting point, if there was a meeting point between the Shay and the engine No. 6 at the time of this accident?

A. At the South end of the "Y".

Q. Where is that with reference to Ora? Nearest or furthest from it?

A. Nearest to Ora.

Q. Which one of the engines at that time had the right of way over the "Y"?

A. The Shay had the right of way over the "Y" until the empties were moved.

Q. If engine No. 6 went out and the empties were not moved at the time it reached the "Y", what was its duty?

A. If the empties were not moved the 6 was supposed to wait there until the Shay got there.

Q. Were the empties there the morning this accident occurred?

A. Yes sir, the empties were standing there on the "Y".

Q. Did you ever ride out on the 6 from Ora with Mr. Pierce?

A. I rode out that morning?

Q. Did you ever ride out before?

A. I never rode out very many times before. Sometimes I would come in town and stay over Sunday and go out Monday morning, but not often.

185 Q. During the time Mr. Pierce was the engineer, who was it that took the Shay to get the empties at the "Y"?

A. Claud Warren was fireman, when Mr. Pierce was in town——

Q. State whether or not you ever saw Mr. Pierce come in on the Shay on Monday morning to the camps?

A. Yes sir, several times,—the fireman would take the Shay after the empties.

Q. Would he be on the Shay when the fireman went after them?

A. No sir, he would get on the Shay over at the "Y".

Q. Did you ever see Mrs. Perkins after the accident happened?

A. Yes sir.

Q. Did you go to where she was?

A. I went to where she was after they got her off the engine on the car. When I seen her Will Tatum was bringing her over to the tank.

Cross-examination.

(By Mr. DENT:)

Q. Mr. Everett, did you ever see me before?

A. Yes sir.

Q. Were you in the room yonder (indicating) yesterday, where those beds are, and talked to me?

A. Yes sir.

Q. Will you say under your oath you didn't tell me, in the presence of Mr. Williams and Mr. Zabe Ducksworth and a number of other gentlemen, that you didn't know who had the right of way where the wreck occurred?

A. No sir.

Q. You did not?

A. No sir.

Q. You say on your oath to this jury that you didn't say you don't know who had the right of way?

A. No sir.

Q. And didn't you see me write it down?

A. No sir, I didn't see you write it down.

186 Q. You tell this jury it is true you didn't say you didn't know who had the right of way?

A. No sir, I didn't say it,—until these empties were moved I said the Shay had the right of way, until these empties were moved.

Q. Then, Mr. Everett, what ought to have gone first?

A. After the empties were moved, the Shay was supposed to go to the camps ahead, unless the 6 passed it at the "Y" and went to the camps.

Q. Then the Shay didn't always go back ahead of the 6?

A. Pretty near always.

Q. Did it always do it?

A. No sir, sometimes the 6 would pass the Shay at the South end of the "Y".

Q. Then the 6 did pass the Shay sometimes and the Shay would be on the "Y" and engine 6 would be on the main line, wouldn't it?

A. When it would back in to pick up the empties. Sometimes the 6 would pass it and go ahead.

Q. Then it is not true the Shay always went in ahead with the empties?

A. No sir, when it would back in the 6 had a clear road from there to the camp.

Q. What is your occupation?

A. I am an engineer on the loader.

Q. You had nothing to do with the running of the train, did you?

A. No sir.

Q. You had nothing to call your special attention as to who had the right of way did you?

A. I ought to. I generally always seen after the Shay. The Shay engine generally handeled the loader I was running.

Q. You received no directions from Mr. Bishop out at the west end of the line, did you?

A. No sir.

187 —. Mr. Bishop never gave any orders, did he, as to how the trains should be run?

A. He gave orders to the engineer sometimes;—Mr. Tatum would leave orders with him.

Q. Mr. Bishop didn't give you any orders though, did he?

A. No sir.

Q. How old a man are you?

A. 26 years old.

Q. Don't you recall that you stated in the presence of Mr. Zabe Ducksworth, again, that you didn't know who had the right of way the morning the wreck occurred, and in the presence of Mr. Williams, the father-in-law of this man Pearce;—don't you recall that?

A. That I didn't know *a*ho had the right of way?

Q. Yes.

A. No sir, not until those empties were moved.

Q. Did you say anything about those empties being moved?

A. Sure, I certainly did.

Q. Claud Warren was discharged;—You told me Claude Warren was discharged——

By Mr. BRADY: We object to what he told him about Claud Warren, because it is incompetent and known to be incompetent by the court and the practicing attorneys.

By Mr. DENT: I want the court to sustain the objection.

By the COURT: The objection is sustained.

Q. Do you know what orders were given to run either of those trains that morning?

A. No sir, not that morning, I don't.

Q. You don't know anything about the orders that were given that morning?

A. No sir.

Q. How can you say on your Oath which train had the right of way?

188 A. Both of the trains always had the right of way over the 6-spot when it was handling steel.

Q. You just state that as a conclusion, from the custom?

By Mr. BRADY: We object.

By the COURT:

Q. Was that the reason you stated it,—because it was a custom?

A. Yes sir, it was a custom, always.

Q. Mr. Tatum had the authority and frequently changed the running of the trains?

A. Yes sir, I guess he could if he wanted to, by consulting with Mr. Reimer and giving the orders.

Q. Do you know anything about a change of 30 minutes in the schedule of the train, the day the accident happened?

By Mr. BRADY: We object, for the reason there is no testimony

to show there was a change of 30 minutes on the date the accident happened.

Q. Do you know whether or not there had been a change of the schedule, and that it went into effect on the day the accident happened?
A. No sir.
Q. You had no information at all with reference to that?
A. No sir, not in the change of the schedule.
Q. Are you still in the employment of the Easterling Lumber Co.?
A. Yes sir.
Q. Do you know Mr. W. B. Walker, who worked as an engineer out there?
A. I knew Mr. Barksdale Walker who switched out there for a while.
Q. And he is now working for the Ship Island Lumber Company?
A. I don't know where he is working.
Q. Do you know Mr. Jim Burnham?
A. Yes sir.
Q. And Mr. Tim Sears?
A. Yes sir.

189 T. P. PERKINS (White), being called as a witness by the defendant, and after being duly sworn, on oath testified as follows:

Direct examination.

(By Mr. BRADY:)

Q. Mr. Perkins are you at work for the Easterling Lumber Co.?
A. Yes sir.
Q. Have you any interest in this case?
A. No sir.
Q. Were you on the engine that wrecked?
A. Yes sir.
Q. You were on engine No. 6?
A. Yes sir.
Q. Was your wife on that engine?
A. Yes sir.
Q. Did you see the engine that you collided with before you got to it?
A. Yes sir.
Q. Did your wife see it?
A. Yes sir.
Q. What did she do?
A. She jumped off the seat.
Q. What seat was she sitting on?
A. On the fireman's seat.
Q. Was she in front of the engineer's seat?
A. She was between the engineer's seat and the fireman's seat.
Q. Was she in front of the end of the boiler?

A. Yes sir.
Q. Where were you when she jumped off?
A. I was standing near the cab near her.
Q. Were you standing near the engineer's seat?
A. Yes sir.
Q. Between her and the engineer's seat?
190 A. Yes sir.
Q. You were between her and the engineer then?
A. Yes sir.

Objection. Leading.
By the COURT: Don't lead your witness.

Q. What did you do when she jumped off the seat?
A. I caught her in my right arm.
Q. What did you do until the wreck came?
A. I never did anything but just stand up there in the engine.
Q. What did you do towards holding her?
A. I never had my hand on her before they hit.
Q. Just before they hit what did you do—Did you do anything before they hit?
A. No sir.
Q. Mr. Perkins when did you take hold of her?
A. When she came off the seat down in front of the boiler.
Q. Had they struck then?
A. No sir.
Q. State whether or not she was pushed up into the coal chute or wood box?
A. No sir.

Objection. That is leading. Overruled. Plaintiffe xcepts.

Q. Did Mr. Pierce take hold of her after she jumped off the seat, and push her up into the wood box or coal shute, before he jumped off?
A. No sir.
Q. Who had hold of her?
A. When they hit?
Q. Yes sir?
A. I did myself.
191 Q. Who had hold of her just before they hit?
A. No one at all.
Q. At the time they hit who had hold of her?
A. I did.
Q. Was she in the coal chute or wood box?
A. No sir.
Q. Did anybody take hold of her and push her in there?
A. No sir, not until after the wreck, after they hit.
Q. And who did that?
A. Mr. Tatum and Mr. Earl Mooney.
Q. Who had hold of her when they came to where you were?
A. I did myself.
Q You lived in the woods, I believe?

A. Yes sir.
Q. Did you know Mr. Sam Pierce when he was out in the woods?
A. Yes sir.
Q. What did he do?
A. He ran the Shay engine.
Q. Who was his fireman?
A. Claud Warren.
Q. Fireman of what engine?
A. 5.
Q. State whether or not that is the Shay engine?
A. Yes sir.
Q. What did Claude Warren do with this engine on Monday mornings, if anything?
A. Sometimes he came to the "Y" after empties.
By Mr. DENT: Did you know—Did you come to the "Y" with him—Did he leave the camp with the engine?

Objection.
By the COURT: Two lawyers can't ask questions. Sustained.

Q. Was Mr. Pierce on the Shay when he went to the "Y" after the empties on Monday mornings?
192 A. No sir.
Q. Who returned with him, if anybody, on the Shay with the empties?
A. Mr. Pierce would come back with him.
Q. State whether or not you ever saw him come back on the Shay that Mr. Warren carried down after the empties?
A. Yes sir.
Q. You have seen that, have you?
A. Yes sir.

Cross-examination.

(By Mr. DENT:)

Q. How do you know they went to the "Y" Mr. Perkins?
A. I have been there when they came after the empties.
Q. How do you know he would leave the camp?
A. The Shay stayed in the camp every night.
Q. How did you get to the "Y"?
A. From where?
Q. From where you lived?
A. To the "Y"?
Q. Yes?
A. I would go out on the Shay sometimes.
Q. How many times?
A. I don't know sir, how many times.
Q. The Shay went out and got the empties, and came back before No. 6 didn't it?
A. Yes sir, every Monday morning.
Q. It went out and got the cars, and came back — 6 got there?
A. I don't know about it going before 6.

Q. I say before 6 train arrived at the camp?
A. Yes sir.
Q. The Shay would go out and get the empties from the camp and get back to the camp before 6 got there, didn't it? And turn loose the hands to work?
193 Mr. BRADY: It got where?
By Mr. DENT: To the camp.
A. Yes sir.
Q. Now 6 would come in with the men to work, wouldn't they?
A. Sometimes they men would catch the Shay at the "Y" when the 6 would get there.
Q. Do you know whether or not the Shay was late on the morning this accident happened? Wasn't it late — account of Mr. Warren not getting out?
A. I don't know, I wasn't at the Camp.
Q. How do you know it went out from the Camp to the "Y" at all?
A. That morning?
Q. Yes?
A. The Shay stayed in the camp over night.
Q. Do you know of your own knowledge it left that camp that morning?
A. No sir, I don't know whether it left the camp that morning or not, because I wasn't at the Cmap.
Q. Do you know of your own knowledge whether it left the camp the Monday morning before that?
A. I couldn't say.
Q. Do you know whether, of your own knowledge it left the camp the third Monday morning before that?
A. I know it left there some mornings, because I was there when it left. The empties stayed at the "Y" and he would come back with them; he would have the empties when he got back.
Q. Of your own knowledge, you don't know where he went to get them?
A. I know where they always left them.
Q. He made that trip every Monday morning, didn't he?
A. Yes sir.
194 Q. You are absolutely certain about that?
A. I think he did, the Shay went to the "Y" every Monday morning and got the empties.
Q. You are sure of that?
A. Yes sir.
Q. They didn't have cars out there every Monday morning, did they?
A. They did every Monday morning I worked there.
Q. You don't know of your own knowledge whether they went out there every Monday morning or not, do you?

Objection. He has answered that several times.
By the COURT: I think he has answer that enough.
Plaintiff excepts to the ruling of the court.

Q. You were on the engine?
A. Yes sir.
Q. And Will Little's wife was there?
A. Yes sir.
Q. She got hurt, didn't she?
A. No sir.

Objection. Incompetent.

Sustained. I think it is incompetent to ask about other people being hurt.

Plaintiff excepts to the ruling of the court.

Q. Mr. Perkins, there was a great deal of excitement there at that time, wasn't it?
A. Yes sir.
Q. Sam Pierce did every thing he could do to stop his engine, didn't he before he stopped?
A. Yes sir, he reversed his engine.
195 Q. And did all he could to stop it, didn't he?
A. Yes sir.
Q. The fireman on the Shay engine could see Mr. Pierce's engine further than Mr. Pierce could see his, couldn't he, account of the curve?

Objection.

A. I don't know whether he could or not.
By the COURT: Let him answer.
Q. You don't know about that?
A. No sir.
Q. You don't know what the fireman or engineer did on the Shay to keep from running into No. 6?
A. No sir.
Q. You can't say whether or not Mr. Pierce helped or shoved your wife around in getting out himself, could you?
A. He could have run against her.
Q. He could have shoved her or helped her out of the way so far as he was concerned; you were all trying to get off? weren't you?
A. I wasn't, I caught her and held her.
Q. To keep her from getting off?
A. I don't know whether she could have got off or not.

JOHN L. TATUM (White), Defendant, being called as a witness by counsel for defendant, and being duly sworn, on oath testified as follows:

Direct examination.

(By Mr. BRADY:)

Q. What is your name?
A. John Tatum?
Q. Mr. Tatum, were you at work for the Easterling Lumber Co.?
A. Yes sir.
196 Q. In what capacity have you worked for them?
A. I am working on the loading crew now.

Q. How long have you been at work for them?
A. Off and on for the last ten years.
Q. You have been sued here in this case, haven't you?
A. Yes sir.
Q. You were running the Shay engine the morning of this accident?
A. I was.
Q. Where did you get the Shay engine?
A. At the camps.
Q. Where were you going with it?
A. Going after the empties at the "Y."
Q. What instructions did you have about this engine, if you had any instructions, had the right of way over the "Y"?
A. The engineer told me the night before that, on Sunday night when he wanted me to go after the empties the next morning; that he had lost a good lot of sleep and——
Q. Don't tell that.
A. He said the Shay had the right of way—I ask- him.
Q. How often had you run the Shay?
A. That was the first time in a week or two. I had handled it around there a right smart.
Q. Around where a right smart?
A. Around the camps and from the "Y" back to the camps.
Q. How long had you been doing that?
A. I only did it two or three times.
Q. Did you ever run the 6?
A. No sir, I don't believe I did—I ran the 6 once to the camps.
Q. State whether or not you did anything as hostler there?
A. I hostlered that Sunday night.
Q. That was the Sunday night before the wreck Monday morning?
A. Yes sir.
Q. Where were the empties left on Saturday evening, if you know?
197 A. They were left at the "Y".
Q. Do you know of your own knowledge?
A. Yes sir.
Q. State whether or not that was the rule?
A. Yes sir, that was the rule.
Q. To leave the empties there?
A. Yes sir.
Q. State whether or not there is any rule about going after the empties.
A. The rule was the Shay would go after them every Monday morning.
Q. You were going after them the morning of this accident?
A. Yes sir.
Q. Did your locomotive have a head-light?
A. Yes sir.
Q. Did you light it when you started?
A. I lit it when I left the camp.
Q. State whether or not it was foggy?

A. It was foggy and I couldn't see the front end of the engine when I started from the Camps.

Q. State what speed you were going at the time your engine was struck by engine No. 6?

A. I just was moving.

Q. Did you see it before it struck you?

A. The 6?

Q. Yes?

A. Yes sir.

Q. How long before?

A. I suppose about a car length; I seen the bulk——

Q. That was all you saw just the bulk of the engine?

A. Yes sir.

Q. You say you were just moving? How many miles an hour was that?

A. I don't know, about a mile an hour, I guess.

198 Q. You were just barely moving then?

A. Yes sir.

Q. Did you ever ride engine 6 from Ora to the "Y"?

A. No sir.

Q. You never did?

A. No sir, not on Monday mornings.

Q. Were you out there when Mr. Pierce was engineer on the Shay?

A. Yes sir.

Q. Do you know whether the Shay went to the "Y" when he was the engineer on the Shay on Monday mornings or not?

A. It did.

Q. Who carried it to the "Y"?

A. His fireman, Claud Warren.

Q. Do you know what it brought back then?

A. It brought back empties.

Q. Who brought them back?

A. Mr. Pierce.

Q. Where would he be on Saturday nights?

A. He would be at home every Saturday night.

Q. Where would the empties be that the Shay would carry in on Monday morning?

A. How is that?

Q. Where would the empty cars be that the Shay would carry into the camps on Monday morning?

A. They would be at the "Y."

Q. Why were you running slow at that time?

A. We were going down hill and it was mighty foggy and I didn't know but something might be on the track. I put on my brake a time or two going down the hill to check it.

Q. Did you expect No. 6 to be on the track?

A. No sir, I did not. I knew if it had come to the "Y" it was at the south end of the "Y" waiting.

Q. You knew that was where it stopped?

199 A. Yes sir.

Q. Did you blow a whistle before you went into the "Y"?

A. Yes sir.
Q. Did you hear No. 6 blow a whistle before it entered the "Y"?
A. No sir.

Cross-examination.

(By Mr. DENT:)

Q. Did you testify in this case in the City of Jackson before Judge H. C. Niles on a motion to remand from that court back to this court?
A. How is that?
By the COURT: He asked you if you testified in the City of Jackson before Judge Niles.
A. Yes sir.
Q. You don't know anything about how the train you took charge of was to be run on that morning, did you?
A. Yes sir.
Q. From whom did you get your information?
A. Claud Warren the engineer.
Q. You didn't get any information from Mr. Bishop, the Assistant Superintendent out there did you?
A. No sir.
Q. You didn't get any information from him at all?
A. No sir.
Q. You didn't get any information from Mr. Will Tatum, the Superintendent, did you?
A. No sir.
Q. Your engine ran out late that morning, didn't it?
A. It was about ten minutes later than usual.
Q. What time did you leave the camp?
A. We left there about ten minutes after 5.
Q. It wasn't ten minutes before 5 was it?
A. No sir.
200 Q. Are you certain about that?
A. No sir.
Q. When did you look at your watch?
A. I looked at Mr. Frank Phillip's clock.
Q. You were running an engine out there without any watch?
A. Yes sir.
Q. And this was the first time you had ever handeled that engine?
A. It was the first time I ever went after the empties with it.
Q. It was the first time you had ever gone out on that run?
A. Yes sir, to the "Y" after the empties.
Q. You have never handeled the engine except the 4 times testified to here before Mr. Brady?
A. Yes sir, I have handled the Shay before and the 6 too.
Q. You had handeled the 6 one trip?
A. Yes sir.
Q. What was your regular work there?
A. I did have a job top loading, and at the time I was firing and switching.
Q. How long had it been since you had been on an engine?

A. It had been two or three months.

Q. The Superintendent and the Assistant Superintendent were the proper parties to give orders, weren't they, to run those trains?

A. To the engineer,—yes sir, I suppose they were.

Q. And you knew nothing about how it was to be run except the way the engineer told you?

A. That is all I knew. He told me to go to the "Y" and 6 had been waiting there every Monday morning and would wait for me.

Q. You didn't receive any instructions from anybody as to how to run the engine that morning, did you?

A. Not that morning, no sir.

Q. You received none from the Superintendent or the Assistant Superintendent?

A. No sir.

201 Q. You knew the trains passed at different places along the road didn't you?

A. Through the week, yes sir.

Q. Monday morning was through the week wasn't it?

A. Monday morning they always passed at the "Y."

Q. How long did it take you to run from the Camps to the "Y"?

A. It taken I guess 15 minutes.

Q. What time did the wreck occur?

A. About five minutes after 6 or 6 o'clock.

Q. How many were in charge of the engine?

A. Me and another fellow.

Q. Where was your flagman?

A. I didn't have any the fireman was all.

Q. A train to be properly handeled requires an engineer, fireman and a flagman, don't it?

A. I don't know how that *it* is on a log road.

Q. You made how many stops going out there that morning?

A. Two stops.

Q. How long did you stop each time?

A. I don't know exactly; we got wood once and water once.

Q. How long did it take you to do that?

A. We were 20 minutes I suppose getting water, and I reckon 5 or 10 or 15 minutes getting wood.

Q. You could get water and wood in 30 minutes, couldn't you? and did do it that morning?

A. I couldn't say because I don't know.

Q. Well, 30 minutes, more or less?

A. I expect it would take a little longer than thirty minutes because we had a good deal of trouble getting water. We were late.

Q. What time were you due to be out at the "Y"?

A. 6 o'clock.

Q. Tell the jury how you figured you were running late;—what time did the wreck occur?

202 A. About 6 o'clock.

Q. You told the jury you were late?

A. We were later than usual. We always start from the camps at 5 o'clock.

Q. And they run out there and got those empties before 6 came along and got the empties, and started back before 6 come?
A. Some times.
Q. Didn't they do that as a usual thing?
A. I don't know about that.
Q. And didn't they do that so the men could get out there and——
A. Every Monday morning the loading crew came from town and didn't have anything to do out there until the empties got there. The empties had to be out there before the loading crew went to work.
Q. How many of that crew were loaders?
A. A few were loading men and some were toungers.
Q. How long had it been since you had run a train to the "Y"?
A. I don't know.
Q. You didn't know anything about the time for No. 6 having been changed—its leaving time, did you?
A. No sir.
Q. You didn't know anything about that?
A. No sir.
Q. Mr. Tatum didn't say anything about that to you, did he?
A. No sir.
Q. And the Assistant Superintendent at your end of the line didn't say anything to you about it, did he?
A. No sir, he didn't say anything about the change of time.
Q. You ran into Mr. Pierce on the main line, where there is a "Y", didn't you?

By Mr. BRADY: Objection. The witness has never stated he ran into him.

203 By the COURT: The question assumes it is true that he ran into Pierce. Let him tell what happened and where it happened.

Q. Wasn't this question asked you in the Federal Court when you testified as a witness? "Q. Was that before or after?" A. I am going by what the engineer told me. Q. Was that before or after the accident that he told you anything about it"; and didn't you answer it "before"? A. No. 6 would meet met at the "Y." He says "Mr. Tatum gave us orders to meet there every Monday morning, and of course I went out and I wasn't looking for cars at all when I run into them." Wasn't that your testimony there?
A. Yes sir.
Q. Wasn't that correct?
A. Yes sir.
Q. Then you run this Shay engine into the engine that Mr. Pierce was running, didn't you?

By Mr. BRADY: That is incompetent.
By the COURT: State whether or not you run into 6?

A. I don't know whether you would call it I run into 6 or he run into me, we ran together.
Q. Didn't you testify in the Federal Court in Jackson, Miss. that

you ran into them, and isn't this your testimony,—I have just shown it to you. (Shows witness papers.)

A. I don't know whether I said I ran into him or not.

Q. Didn't you say you run into "them"? Here is your testimony: (Reads) "And I went out and wasn't looking for the cars at all when I ran into them." Isn't that what you said?

A. Into the 6. I didn't run into any cars.

204 Q. That is your testimony; that is correct, isn't it?

A. They went together is all I know.

Q. Now, Mr. Tatum you say you were running about how fast?

A. About a mile an hour.

Q. You had your head light lit up did you?

A. I had it lit up when I left the camp, but it went out.

Q. Running out there with a light out—is that right?

A. Yes sir.

Q. Where did it go out?

A. I couldn't tell where it went out, it went out between there and the camps, somewhere. I suppose it went out; I just saw smoke around there after it got light enough to see the front end.

Q. How much late were you?

A. About ten minutes late.

Q. Were you late at the "Y" or the other place?

A. At the other place;—at the camp.

Q. Where did you make up the time?

A. On the road somewhere I guess.

Q. How long did you say it took you to run from the Camp out there?

A. About 15 minutes, I guess.

Q. Was it light or dark when this wreck occurred?

A. It was you might say day-night.

Q. Who was your fireman.

A. Pleas Everett.

Q. He is here, isn't he.

A. Yes sir, I couldn't see nothing for the fogg.

Q. You say you were not looking for the cars at all?

A. I was going after the cars I was looking for 6.

Q. You were not keeping a lookout at all up the line?

A. I was looking for them to be at the ot-er end of the "Y" because I knew it was time for them to be there.

205 Q. There was nothing said about the 6 when you were coming out?

A. No sir, not between me and the fireman.

Q. You are sure about that?

A. Yes sir.

Q. Have you got in evidence all the trips you have made on any kind of an engine?

A. No sir.

Q. How m*a*y more did you make?

A. They had an*d* old Shay here once and I Run it a while.

Q. How long?

A. Two or three weeks.

Q. Where?
A. At Ora.
Q. When?
A. 1907.

Redirect examination.

(By Mr. BRADY:)

Q. What did you do after you saw that train coming towards you?

A. I reversed the engine and put on my brake and locked it, and released the brake and cracked the throttle and started to get off the seat and they ran together.

Q. When you released the brake and cracked the throttle what would that do?

A. It wouldn't do anything only lock the running gear.

Q. Was it locked at the time it struck.

A. No sir.

Q. It was locking at the time it struck?

A. Yes sir.

Q. State whether or not there was anything you could have done that you didn't do after you saw the 6, to have prevented the accident?

A. No sir, I couldn't have done anything more.

206 Q. Did you leave anything undone that you might have done after you saw the 6?

A. No sir.

Q. How fast was 6 running?

A. I don't know sir, how fast it was running.

Recross-examination.

(By Mr. DENT:)

Q. What did you say you did?—What did you tell the jury you did to that engine when you saw 6?

A. I reversed the engine and applied the brake and I locked it, and I released the brake and cracked the throttle——

Q. What did you release the brake and open the throttle for?

A. The rail was wet and I didn't know what else to do. I opened the sand leaver and there was no sand, and I seen it was locked, and I shut the throttle off.

Q. Going a mile an hour, how far did your train run after you did that?

A. I suppose it went a car length.

Q. Why didn't you have sand in the engine?

A. It wasn't my duty——

Q. Why didn't you have oil in the engine for a light in the headlight, and to keep the headlight burning?

By Mr. BRADY: We object about the sand and headlight, and I move to exclude it.

Sustained. Exception.

Q. You are one of the defendants in this suit here?
A. I suppose so.
Q. You were no regular engineer at all?
A. No sir.
Q. You know Mr. Pierce, the plaintiff here, don't you?
A. Yes sir.
Q. Did you have a conversation with Mr. Pierce on Sunday, in Ora—On one Sunday sometime in April, in which you stated to Mr. Pierce it was your fault in running that engine out
207 there that caused this wreck?

By Mr. BRADY: Wait a minute.
In the first place, a statement by this witness that it was his fault is a mere expression of an opinion, and is totally incompetent.
By the COURT: I think that is true—The objection is sustained.
Plaintiff excepts.

W. W. TATUM (white) defendant, being called as a witness by counsel for defendant, and being duly sworn, testified as follows:

Direct examination.

(By Mr. BRADY:)

Q. Mr. Tatum, you are the Will Tatum that is sued here, are you not?
A. Yes sir.
Q. You are the man that Mr. Pierce testified employed him are you?
A. Yes sir.
Q. State whether or not you employed him of your own motion, or whether he was employed with the advice of Mr. Reimers?

Mr. DENT: We object to the gentleman leading his witness.
Overruled. Exception.

Q. Answer that question now?

(Here the stenographer reads the question).

A. With the advice of Mr. Reimers.
Q. State whether or not you had the authority to have discharged him without the advice of Mr. Reimers?
A. Well, I don't suppose I would. I always consult with
208 Mr. Reimers befo-e I make a change with any of my important men.
Q. State whether there was any order issued by any one to place empty cars on the "Y" on Saturday afternoon?
A. Yes sir. Mr. Reimers told me to leave the cars at the "Y" and not haul them with the men.
Q. Who issued that order?
A. Mr. Reimers issued them to me and I issued them to the engineers.
Q. State whether or not you had the right to change that order

of Mr. Reimers about leaving these cars on the "Y" on Saturday afternoon?

A. No sir, I didn't.

Q. State what orders were issued with reference to when these cars should have been taken from the "Y"?

A. They should have been taken on Monday morning.

Q. What engin- was to take them away?

A. The Shay it was the only one that was out there.

Q. State whether or not there was any orders issued with reference to where the 6 should stop?

A. I gave orders for the 6 to stop at the "Y" and wait for the Shay until the empties were moved, but if they got there and the empties were gone, he could go on through to the camps by flagging against the Shay with the empties.

Q. Suppose the 6 was there and the Shay hadn't come at 6 or 7 or 8 o'clock; what — have been the duty of the 6 spot?

A. To stay there until I gave them orders to move.

Q. State whether or not you ever at any time changed those orders?

A. No sir.

Q. Who gave those orders about where the 6-spot should stop?

A. I gave them.

Q. Who gave them to you?

A. Me and Mr. Reimers had a talk on that and decided the "Y" was the meeting point. He told me not to carry any
209 men on the train, that there was some devilment done with the line of railroad with some ties and spikes, and he told me not to haul any men with the train.

Q. What train?

A. The Shay engine with the empties.

Q. From where?

A. From the "Y".

Q. How were these empties handled? When were they put on this "Y"?

A. Every Saturday evening the Shay would bring the loads and the loader to the south end of the "Y". He would back the loads and the loader on the west end of the "Y" and 4 would be at the south end of the "Y", that is the main line engine.

Q. What does 4 do?

A. He hauls logs from the "Y" to town.

Q. What would the shay do with the empties?

A. While the Shay was backing the empties back on the east end of the "Y" the 4 would be dropping down on the south leg of the "Y"—dropping the empties on the main leg of the "Y".

Q. Does that map with the blue line indicate something about like your lottle road runs? (Hands witn-ss map).

A. It lacks a section of two of being in the right place.

Q. Have you made a sketch that shows how it runs?

A. I have a sketch of the "Y".

Q. Where is it?

A. In my pocket.

Q. Let us see it?
A. It is badly drawn. (Hands Mr. Dent drawing.)
Q. Who drew that?
A. I drew it just a few minutes ago.
Q. Does that sketch I hand you as exhibit "B" to your testimony correctly show the "Y"?
210 A. Yes sir. It might have the curves and crooked rails in it.
Q. But it approximately represents it?
A. Yes sir.

By Mr. DENT (to the jury): Gentlemen I would ask you to step out here and let this witness explain to you about how the "Y" is used.

A. (Indicating:) This is the south end of the "Y".
Q. Is that the end towards Ora?
A. Yes sir. There is the line going to Ora, that is the line going to the camps, this is the north-east leg of the "Y" where we back the loads, this is the main line coming from Ora to the Camps; this is the No-th leg of the "Y", and this is the east leg, and this is the South leg. The Shay is hauling from the woods to the South end of the "Y".
Q. This is the end next to Ora?
A. Yes sir.
Q. Where would it put these loads?
A. On the North east end of the "Y" so 4 could pull down the main line and leave his empties, and back in on the north end of the "Y" and couple to the loads on the north-east end of the "Y", and 4 would couple to his loads, and come down the east leg of the "Y".
Q. Then what would he do?
A. He would strike the main line at the south switch and come down with his loads. The Shay would come to the main line leg of the "Y", couple to the empties and after the 4 had pulled his logs off the north east end of the "Y", the Shay would set his empties on the east leg of the "Y" and follow the 4 on to town with the loader to wash out.
Q. That was the way it was handled on Saturday nights, was it?
A. Yes sir.
211 Q. Just one other question with reference to the "Y"; What should No. 6 have done if empties were in on the "Y" Monday morning?
A. He should have stayed there until the Shay got the Empties.
Q. What would have been gained, if anything, by sending No. * in a head of the Shay and the empties?
A. Sometime- if the empties were there we would flag over here——
Q. That is not the question—What would have been gained if anything, by sending the 6 over ahead of the Shay?
A. Not anything only getting the railroad men to their work. The loading crew couldn't do anything until the empties were taken off the "Y" and got back to the camps.

Q. If you had sent the 6 to work on the railroad between the camps and the "Y" then state whether or not it would have been in the way of the Shay and the empties when they come over?

A. Sure it would have been in the way. The 6 would have had to carry them and drop them and then backed over here and let the Shay take the empties.

Q. Something is said about you having advanced the time of No. 6 some 30 minutes. State whether or not in advancing the time for it to leave Ora you changed the order about it going on to the "Y"?

A. No sir.

Q. Why was it you advanced the time?

A. We had so many stops to make Monday morning picking up the men going to work, until we couldn't make connection, and we would be so late getting out with the men, and I told Mr. Pierce I wanted him to leave at 5 or 5:15 anyhow so the men could get to work earlier.

Q. Did you tell Mr. Pierce to run over the "Y", and give him the right of way over the Shay at the "Y"?

A. No sir.

Q. Did you change the right of way of these engines, in any way from the general rule, with reference to their going over the "Y"?

212 A. No sir, I only changed the 6 to leave town earlier.

Q. Did you change it so far as going over the "Y" was concerned with reference to 5?

A. No sir.

Q. What was the duty of the 6 to have done if the empties were in on the "Y"?

A. They should have stopped there and waited for the Shay until the cars were moved, unless he had given him other orders.

Q. Mr. Pierce was engineer on the Shay for a while, wasn't he?

A. Yes sir.

Q. While he was engineer on the Shay, do you know whether he rode 6 into town or not?——

A. Yes sir.

Q. Of your own knowledge?

A. Yes sir.

Q. Do you know whether he rode it back on Monday morning or not?

A. Yes sir.

Q. What did he do when he reached the "Y" on Monday morning when — rode the Shay?

A. If the Shay was there with the empties he would get off and catch his engine, and take the empties back to the camp.

Q. Did you see him do that?

A. Yes sir, his fireman would bring the engine over.

Q. On this morning Mr. Pierce ran this engine over this road, and at the time of the accident, had the general rule you have testified about, under which the Shay had the right of way over the "Y" been changed?

A. No sir, it has not been changed yet.
Q. That is still a rule?
A. Yes sir, but we are not logging out there.
Q. How long had that been the general rule?
A. I don't know but every since we had been out there.
Q. How long before you and Mr. Reimers talked about it—before the accident was it?

213 A. I don't know I carried the empties back on Saturday night once or twice, and was talking with him about the spikes and ties that had been put on the track, and the switches thrown there, and he said——

By Mr. DENT: We object to what Mr. Reimers said.
Overruled. Exception.

A. He gave me orders never to pull a train with the men;—pulling them backwards and forwards to town——
Q. What train do you mean?
A. That is the Shay or any train that has the men.
Q. He gave you orders never to pull them where?
A. To town or back to the woods.
Q. Do you mean he said the men were not to ride the trains?
A. They were not to ride the train with the full train of cars.
Q. What train were they to go to the woods on?
A. The 6 carried them out every morning and brought them back every night except Saturday night.
Q. Was that a full train?
A. No sir, it was an engine and two cars.
Q. How long was it after he gave that order until the accident occurred?
A. I don't know exactly.
Q. About how long Mr. Tatum?
A. I don't know exactly how long it was.
Q. Can't you give some idea. You said it had been practically every since you had been out there?
A. Yes sir, but I don't know how long we were out there that the wreck occurred.
Q. Was it before Mr. Pierce came with the company?
A. Yes sir, that was while Jim Tolan was running.
Q. Was that before Mr. Pierce began to run out there?
A. Yes sir.

214 Q. When Mr. Pierce was transferred from the Shay to the 6 did you give him instructions about where to stop his train?
A. Yes sir, I told him to never pass the "Y" when the empties were there with the men; that the Shay would be there every Monday morning to get the empties, the 6 was laying steel and I only had two engines to haul the logs, and I had to keep the log engines busy to haul the logs.
Q. He knew when he was running the Shay what the rule was, didn't he?
A. Yes sir.

Q. And after he began to run the 6 you again stated to him what the rule was?
A. Yes sir.
Q. That was the general rule?
A. Yes sir.
Q. Did you know this, morning the accident occurred, that he had run past the "Y" at that time?
A. No sir, I didn't know where he was until he blew his whistle. I went over the car to the tank. I went over to the back of the tank to talk with my steel gang men, and I had left orders in town to tell No. 4 to come across dry creek when it loaded——
Q. That is immaterial. Did you know he had passed these empties on the "Y" at that time?
A. No sir.
Q. Were the empties on the "Y"?
A. Yes sir.
Q. State whether or not he violated your orders in passing these empties?
A. He did.
Q. Who had the right of way over that "Y" until those cars were moved?
A. No. 5 the Shay.
215 Q. Suppose it was late, who still had the right of way?
A. No. 5, the Shay.
Q. Suppose the 6 had gotten there earlier than it was customery to, who still had the right of way while the empties were in the "Y"?
A. The Shay.

Cross-examination.

(By Mr. DENT:)

Q. Mr. Tatum, is it not true they frequently transferred men from No. 6 on this Shay engine and carried them into the camps ahead of 6, is it, because that was a violation of your orders for them to ride on the Shay when it had cars?
A. The loading crew would sometimes catch their train. The loading crew rode empties all the time.
Q. I thought you said it was a violation of the rules of the company to *carry* them out on the Shay engine?
A. They had got on the engine that handeled them.
Q. You testified in this case before Judge Niles at Jackson didn't you?
A. Yes sir.
Q. Weren't you asked this question?
"Q. What train had the right of way at the time of this accident over this particular piece of track?
A. The Shay.
Q. Did Mr. Pierce know that?
A. I guess he did."

wasn't that the way you answered that? "That was my orders" Didn't you answer "I guess he did; that was my orders"?

By Mr. BRADY: I insist that he turn the record over to the witness and let him read it, and then cross-examine him.

Q. All right here is the record (Witness takes record and reads it) Didn't you state that at that time?

A. Yes sir.

216 Q. Are you more positive about it now than you were then, or will you guess about it now?

A. What do you mean;—about these orders, you said?

Q. Yes, about whether you knew it?

A. He knew it if he hadn't forgot it. I told him. I don't know whether he forgot it or not.

Q. You were on that train, were you? With Mr. Pierce at the time?

A. I was on the car behind the engine.

Q. Didn't you talk with him that morning?

A. Nothing only spoke to him and ask him if he was ready.

Q. You started out earlier that morning than you usually started out, didn't you?

A. Some 15 or 20 minutes late that morning, and he was oiling his engine when I came up, and he said his wife was sick and he like not to have come out, which caused him to be late.

Q. Mr. Tatum, you told Mr. Brady that the Shay always went to the Camps first, didn't you?

A. Went to the Camp?

Q. Yes, over the "Y"?

A. Yes sir.

Q. You are positive about that?

A. When the empties were left at the "Y".

Q. There were always empties left on the "Y".

A. Every Saturday evening empties were left there.

Q. Every Monday morning the Shay preceded the 6 on the camp, didn't it?

A. I think it did.

Q. Are you postive about that?

A. I don't recollect any morning——

Q. You always had cars there though?

A. Yes sir.

217 Q. And you always came out and went to the Camps on the Shay ahead of No. 6?

A. (No answer.)

Q. There never were any transfer of the entire crew of the train that carried the passengers to the camp from the passenger train to the Shay, was there?

A. No sir.

Q. That was against orders?

A. Nothing but the loading crew and maybe a teamster.

Q. There were always sawyers and railroad men and other- on the 6 wasn't there?

A. Most of the sawyers all lived in the woods, because they were all darkies and lived out there. In fact there wasn't many men would come from town except Monday morning.

Q. You gave no instructions to John Tatum that morning, did you, as to how to run this Shay?

A. No sir, I wasn't out there.

Q. The assistant foreman was the proper man to give that order wasn't he?

A. He was the man I gave orders to—the engineer.

Q. And it was his duty to look after that particular train?

A. The orders I gave him was to have the Shay leave there and get the empties back to the camp.

Q. You didn't tell him about No. 6 starting 30 minutes earlier from Ora and coming to the camps?

A. No sir, I didn't have any right to tell him, because it wasn't conflicting with the orders I gave him.

Q. The fact they left Ora 30 minutes earlier didn't make them get to the camp any earlier?

A. They didn't get to the "Y" earlier.

Q. If you had come to the "Y" and cars were sitting there, you would have kept them there all day until the Shay come?

A. I would have kept them there or flagged over myself.
218 I wouldn't let the engine go on, but would have found out where the other one was, and sent a flagman out, because the road is very crooked from the "Y" to dry creek, and down hill.

Q. You didn't start the train out any earlier to get to the camps earlier?

A. To get to the "Y" and meet the Shay and get the loading crew to work earlier.

Q. It wasn't to get the sawyers to work earlier?

A. Most of them worked in the woods.

Q. You picked them up alomg the way, didn't you?

A. Yes sir, we made several stops.

Q. You know Mr. Tim Sears?

A. Yes sir.

Q. You didn't tell Mr. Pierce there were any cars on the "Y" that morning, did you?

A. Not that morning, no sir.

Q. You hadn't talked to Mr. Pierce about the way to run those trains since he took charge of the 6, had you?

A. Yes sir.

Q. Are you sure about that?

A. Yes sir, I did give him orders.

Q. Now then, weren't you asked this question? You go over it with me, and we will read it together:

(Reads.) "Q. Didn't you know that Pierce had orders?

A. (Witness reads the record.)

Q. Wasn't this question asked you: "Q. Don't you know that Mr. Pierce had orders to run to the camps before he stopped that morning?

A. No sir, he didn't.

Q. And didn't you know that his train had the right of way?

A. No sir, he hasn't got it yet."

Q. So you guess Pierce knew they were to pass there?

A. I had given him orders to that effect.

219 Q. When?

A. When he was running on the Shay.

Q. Is that when you gave him the orders?

A. That is the orders I gave him when he was running the Shay.

Q. Did you give him any orders after that at any time?

A. Yes sir.

Q. When?

A. When he was running the 6.

Q. How long before this accident?

A. I couldn't say.

Q. Mr. Tatum do you know Mr. Zabe Ducksworth?

A. Yes sir.

Q. Did you have a conversation with him in Ora when he was present, and several other gentlemen——

A. No sir, I didn't.

Q. Wait a minute—And didn't you state in that conversation some time shortly after the accident—just a short time after the accident, in the village of Ora, when you and Mr. Ducksworth were present?

A. I can't give you the exact day. I think it was the next day after the accident, I think it was on Monday.

Q. Did you have a conversation after the accident, or within a week or so after the accident, on the street in the town of Ora, where Mr. Ducksworth was present, and about a half-dozen others standing around a circle when the matter of this wreck was discussed, and didn't you relate the whole circumstances as to how this accident occurred, and didn't you put it in this way and say: "I gave orders to Claud Warren the engineer on the Shay, to run down early on Monday morning to the "Y" and pick up those empties and get back before the 6 was due there, as the 6 had the right of way over the line to the camps," and didn't you say: "Claud Warren lay up and slept and he sent John Tatum on the engine, and John Tatum had no business on the engine." And didn't you

220 state that Claud Warren had orders to come out and get the empties on the "Y" Monday morning and get back to the camp before 6 got there? Didn't you say he was due there before the 6-spot was due, and didn't you say if Claud Warren had been there at this place, he would have made the clearance all right, and didn't you say it was Claud Warren's fault as soon as he walked up to you after the accident, and didn't you say to Claud Warren "I says you have no job, and I fired him on the spot"? Wasn't that what you told Zabe Ducksworth immediately after the accident in the Town of Ora when you and he and several other persons were present?

By Mr. BRADY: The defendant objects because he does not identify the persons present, and because he wants to know if it wasn't done some time after the accident, and immediately after the accident, and on Monday Tuesday, or Wednesday after the accident, and because the statement of Mr. Tatum, if he made such

a statement, about who was the cause of the accident, and as to whose fault it was, is an opinion.

Overruled. Exception.

By the COURT: Did you have that conversation?

A. No sir.

Q. You didn't tell Mr. Ducksworth there at that time and place that Mr. Pierce was on the track and he had the right of way to the Camps?

A. I don't recollect seeing Mr. Ducksworth.

Q. Didn't you tell that there in the presence of those other parties?

A. No sir, I did not.

221 Q. Didn't you tell Mr. Ducksworth the 6-spot had the right of way from the camps to the—from the Mill to the Camps?

A. No sir.

Q. And that he was on his rights when the wreck occurred?

A. No sir.

Q. You say you didn't have any such conversation as that with Mr. Ducksworth?

A. No sir.

Q. In the presence of those other gentlemen?

By Mr. BRADY: He is evidently laying a predicate to dispute the testimony of this witness. Before he can do that he has to identify the time.

By the COURT: Objection is overruled.

Defendant excepts.

Q. Do you know Mr. Charlie Parker?

A. Yes sir.

Q. How long has he been at work for the Easterling Lumber Co. since this accident?

A. I don't know how long he has been at work; he has been at work a good long while; he don't work all the time he is there.

Q. Did you have a conversation with Mr. Charlie Parker at your house a few days after the wreck? When you and he were present, and didn't you tell him that you gave Claud Warren, the engineer on the Shay, orders to come to the "Y" and get the empties and get back to the camps before Sam had time to get there, and that by reason of him *b*ot obeying the orders he was the cause of the whole wreck; didn't you tell him that?

A. No sir.

Q. You didn't have any such conversation in your house a few days after the accident, with Mr. Charlie Parker?

A. No sir.

Q. No such conversation as that occurred?

222 By the COURT: Mr. Dent has he not denied that several times?

By Mr. BRADY: The defendant objects to the questions asked, for the reason that the statement of this witness and this defendant is

not binding, as agsinst the Easterling Lumber Company, having been made several days afterwards; and if he did make such a statement, then it was a statement of a fellow-servant and not binding upon the defendant, the Easterling Lumber Company and not competent as testimony against him.

By the COURT: I think it is competent; the objection is overruled.

Defendant excepts.

Q. Didn't you have a conversation with Mr. Pierce, the Plaintiff in this case, immediately after this accident, while he was laying on the ground, suffering, and didn't you state this to him "When you blew the whistle ('you' meaning Mr. Pierce) I thought you saw the rear end of the car on the "Y"; and didn't you say "I didn't know there was any cars on the "Y"; they never have been there when the train come out from the mill since I have been here?

By the COURT: Did you say that?

A. No sir.

Q. Did you have a conversation anything like that with Mr. Pierce?

A. I had a conversation with him. A few words passed as I went around to see who was hurt.

Q. Didn't you tell Mr. Pierce there in that connection that you gave the Shay orders early to come over and get those cars and come back to the camp before 6 got to the "Y"; or anywhere out on that part of the line?

223 A. No sir.

Q. You didn't have that conversation?

A. No sir.

Q. And didn't you tell him you didn't know the Shay was out there at that time and place, when you and Mr. Pierce were talking?

A. No sir, I didn't know the Shay was there until he blew the whistle.

Q. What did you tell him?

A. I went around the engine to see who was hurt. I come back by——

By Mr. BRADY: That is not competent, and I object.

Sustained.

Q. Without going into details, didn't you have the same conversation with Mr. Bill James at Ora somewhere about the commis-ary of the Ora Lumber Company, in which you stated practically the same thing as I have stated in the conversation with Mr. Ducksworth?

By Mr. BRADY: We object unless he says the date.

Q. A day or two afterwards; you and Mr. Bill James——

A. I know Sam's father-in-law; is that the man?

Q. Yes sir?

A. I don't recollect——

By the COURT: Did you have the same conversation with him, and did you state what I asked you if you said to Mr. Zabe Ducksworth——

A. About who was the cause of the wreck?
Q. Yes?
A. No sir, I didn't state that to nobody.

224 W. D. REIMERS (white), the defendant, being called as a witness in his own behalf, after being duly sworn, on oath, testified as follows:

Direct examination.

(By Mr. BRADY:)

Q. Mr. Reimers, who is the Superintendent of the Easterling Lumber Company?
A. I am.
Q. Who is the superintendent of this railroad?
A. Well, Mr. Tatum—some call him superintendent and some call him foreman.
Q. I am not talking what they call him; who has charge of this railroad?
A. Mr. Tatum.
Q. Under whom does he operate?
A. Myself.
Q. Under you?
A. Yes sir.
Q. State who fixed the rule, if there was a rule about where the empties should be left on Saturday night?
A. I did.
Q. Where did you fix the place at which the empties were to be left?
A. That is quite a long story.
Q. I am not asking you when? Where was the spot you fixed?
A. The new "Y."
Q. On which end of it—the Ora or west end?
A. They had to be left on the Ora end.
Q. Did anybody have the right to change that rule about where these empties were to be put on Saturday night, without your consent?
A. Nobody.
Q. What was the rule with reference to where the 6-spot should meet the Shay?
225 A. At the "Y."
Q. Which end of the "Y"?
A. South end.
Q. What engine had the right of way over the "Y" while the empties were on the "Y"?
A. The Shay had the right of Way?
Q. On what mornings?
A. Monday mornings.
Q. Do you know anything about this accident?
A. No sir.
Q. Why was it you made that rule, Mr. Reimers?

Objection. Overruled. Exception.

*Q.* We had trouble on our road with train wreckers; they would pull spikes and throw the switches, and the rule generally was to bring the Shay and loader in on Saturday evening to be cleaned and washed out, and to wash out the engine and loader. They would leave Ora late at night, and generally have 3 or 4 or 5 men on the loader and the engine, and they would go to the "Y" and stop and back in and get the empties and go to the camps but I forbid that absolutely.

Q. Why did you forbid it?

A. It was absolutely dangerous. We had big hills and the night would be dark, and I wouldn't let them handle them empties on Saturday night.

*A.* When did you require them to handle them?

A. Monday morning.

Q. That was the rule you made, and you have given the reasons why you gave it?

A. Yes sir.

226 Q. You didn't see the accident yourself?

A. No sir.

Cross-examination.

(By Mr. DENT:)

Q. Mr. Tatum was your foreman?

A. Yes sir.

Q. He was the general manager of the railroad wasn't he?

A. No sir, I am the general manager of the railroad—of everything.

Q. He was the manager?

A. Yes sir.

Q. You gave Mr. Tatum the authority to hire the men and to see that they run the trains?

A. Yes sir, he could hire them with my approval?

Q. He had the authority to run the trains as long as he saw fit?

A. As it requires;—out in the woods—as we go further back——

Q. You don*n*'t know what orders were given by Tatum to Pierce with reference to the train that morning, do you?

A. I did not.

Q. Or with reference to any ot*h*er morning?

A. I do not.

Q. You don't know where the collision occurred?

A. No sir, I knew of course after it *o*ccurred.

Q. You don't know of your own knowledge who had the right of way there?

A. The Shay had the right of way to get the empties.

Q. You don't know whether Mr. Tatum gave the orders or whether the orders were obeyed or not, do you—I say you don't know whether Tatum carried out your orders, or whether the orders you gave were obeyed?

A. If he hadn't I would have soon found out, and discharged him.

227 Q. You found out and found it out mighty quick—You don't know of your own knowledge what others had been given with reference to the Shay that morning, or with reference to the 6?

A. I don't know.

Q. Why did you hesitate to answer my question?

By the COURT: You need not answer that.

Q. You don't know what orders had been given the engine- on the Shay engine that morning, do you?

A. No sir.

By Mr. BRADY: This is the third time he has answered that question.

Q. Or as to what part of the track he had the right of way over?

A. The Shay or the 6?

Q. Either one of them, of your own knowledge?

A. This is the orders I gave them.

Q. But I was talking of your own knowledge?

A. No that morning I couldn't say; those are the orders.

Q. You didn't know anything about the movement of those engines out there that day did you?

A. No sir.

Q. Mr. Reimers, did you make the contract to pay Mr. Pierce: did you hire Mr. Pierce or did Mr. Tatum hire him?

A. Mr. Tatum hired him and came to me and said he could get Mr. Pierce, and I told him to go ahead and try it.

Q. How much were you to pay him per month?

A. $75.

Q. How much did you actually pay him?

A. I don't know, I would have to figure that out.

Q. Have you your books or pay rools?

A. We paid the doctor's fee and——

228 By Mr. BRADY: The question of his paying the Doctor's fee has nothing to do with it. I will concede that he did pay a doctor's fee.

Q. That is all.

By Mr. BRADY: The defendant rests, with the right to introduce Mr. Tolar or some other engineer tomorrow.

ZABE DUCKSWORTH (white), called in rebuttal, by counsel for plaintiff, after being duly sworn on oath, testified as follows:

Direct examination.

(By Mr. DENT:)

Q. Now, Mr. Ducksworth, do you know Mr. Will Tatum?

A. In person, yes; I recognize him personally.

Q. How long have you known him?
A. Ever since he was a kid.
Q. Where do you live, Mr. Ducksworth?
A. In the town of Ora, county of Covington and Beat 3.
Q. The Will that you speak of, is the fireman of the railroad of the Easterling Lumber Company is he?
A. He is said to be Wood's foreman, yes.
Q. Did you have a conversation in the village of Ora, or town of Ora, on the streets of the Town of Ora, somewhere near the Easterling Lumber Company. Store office, with Mr. Will Tatum, with reference to how this accident occurred on the "Y" at the railroad?

By Mr. BRADY: We object, unless he will state when it was.

Q. Shortly after the accident?

229 By Mr. BRADY: I object to that method.
By the COURT: Overruled.

Exception.

A. All right, Your Honor, please, I will do that to a T-y-ty.

By the COURT:

Q. You say you had the conversation?
A. I didn't have a conversation direct, but the statement was made to me and others by Mr. Tatum.

By Mr. BRADY: I Object, the witness says he can give the date on which it was had, to a T-Y-ty, and the defendant wants the time stated before the witness testified.

By the COURT:

Q. When was that?
A. Don't understand me to give the day of the month or week but I will give it definite enough to say it was the day following the day of the wreck.
By the COURT: All right, go ahead.
A. I went down the street to the Company's store, and there was a crowd of men standing by the side walk, among who- was Will Tatum and others. If I recognized them at that time I forgot their faces, or persons; and they were talking of the wreck; and I walked up and Will Tatum turned to me personally, and he says "I told Claud Warren—Saturday evening I gave Claude Warren orders to go down Monday morning before the 6-spot was due and get those empties out and get back to the camp before the time the 6-spot was due there." And he says if he had got up and gone and helped

230 John Tatum as I told him to do, he says they would have made the round and cleared the track before the 6-spot was due; but he lay there and slept, and John Tatum took the engine when he wasn't competent to run the engine and run the engine out himself; and he says: "If two men had been on the engine and wooded and watered it, they would have made the rounds and cleared the track but one man couldn't do it, and they were on the 6-spot's time: and he says "when Claud Warren walked

up, "I told him he had no job" and he said "My side is hurting me an I got to go to bed."

Q. What did he say about firing Claud Warren?

A. "He said he had no job" that he fired him on the spot.

Q. That was told you the day after the accident?

—. Yes sir, about 24 hours afterwards.

Q. Tell these gentlemen what interest you have in the termination of this suit?

A. I have none whatever.

Q. Are you related by blood or marriage to Mr. Pierce?

A. No sir; I never knew Mr. Pierce until he was in the employment of this company, the first time.

Cross-examination.

(By Mr. BRADY:)

Q. Isn't it a fact you stayed in a little back room here with Mr. Dent here yesterday, and Mr. Dent would bring the witnesses in, and you stayed there side by side with him, and you and him investigated the witnesses?

A. I had nothing to do with it.

Q. Weren't you in the room?

A. I was in the room.

Q. Didn't you listen to all the investigation that was made?

A. I didn't stop up my ears.

231 Q. You were in there while the investigation of these witnesses were going on?

A. Yes sir, part of them. I wasn't there while they investigated all, they had conversed with the witnesses before I came yesterday morning. There was only a few of them that came in while I was there.

Q. You sat there listening to it?

A. I wasn't particularly listening, but I was in there, and vibration carried the sound to my ears and I entertained what fell.

Q. How did Mr. Dent find out what Mr. Tatum told you?

A. Just like you found out what Mr. Reimers said.

Q. You went to him and volunteered the information, didn't you?

A. No sir. Mr. Pierce had been home a week before I knew he was at home, and I went down, as my custom is to see the sick folks.

Q. You answer my question——

A. I am no prisoner.

By the COURT: Answer the lawyer's question.

Q. Now, Mr. Ducksworth, you went down and told what you had heard about that the first time you visited him after he got back here didn't you?

A. I don't know whether it was the first, second, or third.

Q. You visited him a good many times then?

A. Yes sir.

Q. And during that time you told him all about this; What you heard Tatum say?

A. I w*nat* to state to the jury how it came about.

By the COURT: Let him explain.

232 A. I went down and Mr. Pierce was telling me about the wreck, and I unintentionally unthoughtedly made mention of what Mr. Tatum said about the wreck, and the first thing I knew here comes a summons to appear before the court in this County.

Q. Are you through?

A. Yes sir.

Q. That was unthoughtedly done?

A. Yes sir.

Q. You didn't intend to let him know?

A. Certainly; I just made mention of something that Tatum said.

Q. If you knew you could have helped him, and knew you knew something that would be helpful to him; yet you didn't intend to tell that, did you?

A. I hadn't give that any thought, Tom.

Q. Don't argue the question; you just let that slip out?

A. I can't tell you whether it slipped or was cogged out.

Q. But you know you didn't intend to let him have it?

A. If I hadn't intended to give the information of the facts I would have gone out of the room.

Q. Didn't you say unintentionally told it?

A. I said I unthoughtedly told him——

Q. You wouldn't have told him——

A. If I had had any reason to think that it would have imprisoned me as a witness I would not have told it.

Q. You have been imprisoned, have you as a witness?

A. Yes sir. The first time in my life.

Q. You would not have told Mr. Pierce this valuable information rather than to be inconvenienced by being a witness, you would have kept it a secret, would you?

A. I hav-n't studied my mind on this thing particularly.

Q. Didn't you say if you had known if it had made you a

233 prisoner—a witness—you would not have told it.

A. I am no hand to busy in other people's business——

Q. I am not asking you that——

A. It is the next thing to it.

Q. Didn't you tell this jury that if you had known it would have caused you to be a witness, you would not have told it?

A. To cause enemies, I would not have told it.

Q. Even if you *would* known your testimony would have been of assistance to Mr. Pierce?

A. I rendered all the assistance to Mr. Pierce I could have anyway but I didn't render that to help him at all.

Q. You say it was the day after this wreck that you had this first conversation?

A. Yes sir.

Q. When did you tell Mr. Pierce about it first?

A. When he came home. I don't know. It was a week or two

weeks, but he had been home a week or two before I knew he had returned.

Q. And that was after he had been to Hattisburg and come back?
A. Yes sir.
Q. And you went to see him?
A. Yes sir.
Q. And that was a month or so after the wreck?
A. I didn't say that.
Q. It was, wasn't it?
A. I don't know.
Q. You know this conversation you had was the next day after the wreck?
A. Yes sir, I know that.
Q. You swear that positively?
A. I tell it, and I have done been sworn.
Q. You are as sure of that fact as you are about anything else to which you have testified?

234 A. Yes sir, I am just as positive of that as anything I have testified to in this court.

Redirect examination.

(By Mr. BRADY:)

Q. What do you mean by imprisonment?—You mean being in a witness room, and not being in a jail, don't you?
A. What is the difference in being shut up in jail and can't get dinner or anything? I went to the hotel and couldn't get dinner and they shut me off——

By Mr. BRADY:

Q. Do you see well?
A. No sir.
Q. Your eyesight is very defective, isn't it?
A. Yes sir.
Q. Can't you recognize anything at a distance?
A. Some things I can recognize at a distance.
Q. Mr. Will Tatum is a truthful man isn't he?

Objection. Sustained. Exception.

Q. Do you know what his reputation is for truth and veracity?

Objection. Sustained. Exception.

235 CHARLIE PARKER (White), being called as a witness by counsel for plaintiff, and being duly sworn, on oath testified as follows:

Direct examination.

(By Mr. DENT:)

Q. What is your name?
A. Charlie Parker.

Q. Now, talk out loud, please, so the jury can hear you; what is your occupation?

A. Feeding a machine at the planing mill.

Q. For whom?

A. The Easterling Lumber Company.

Q. How long have you been engaged in that work?

A. I have been working for them off and on for three years.

Objection. Overruled. Exception.

Q. Do you know Will Tatum?

A. Yes sir.

Q. Is he the general manager—What position does he occupy with the Easterling Lumber Company? With reference to its railroad?

A. He is foreman in the woods and of the railroad.

Q. Foreman of the railroad too, is he?

A. Yes sir.

Q. State whether or not you had a conversation with Will Tatum a few days after the plaintiff was injured in the wreck, at his house, when you and him were present, in which he detailed to you how the wreck occurred?

A. I did.

Q. Please state what that conversation was?

236 By Mr. BRADY: We object to his detailing any general conversation, there was a predicate laid to impeach Mr. Tatum, and Mr. Tatum was asked certain questions, and this witness' testimony must be confined to the predicate laid.

By Mr. DENT: I don't want it for any other purpose than impeachment.

By the COURT: Go ahead and answer the question.

Q. I want you to state whether or not: State what he said with reference to giving Claud Warren orders, if any thing?

A. Yes sir; he told me he had given Claud Warren orders to the "Y" Monday morning and pick up the empties and get back to the camp before Mr. Pierce could get there, and by his disobeying the orders, he was the cause of the wreck.

By the COURT: Let that last part be excluded about his disobeying the orders and causing the wreck. That is the opinion of the witness Tatum.

By Mr. BRADY: We move to exclude the entire answer, for the reason Mr. Tatum was asked the question as to whether or not he didn't tell Mr. Parker that the 6-spot had the right of way, and Mr. Tatum said he did not tell him so, and the question asked the witness Parker about what Tatum said was not asked Mr. Tatum, and the predicate was not properly laid to introduce such testimony as Mr. Parker has testified to.

Overruled. Defendant excepts.

237 By Mr. BRADY: I want to interpose this further objection: The testimony contradicts Mr. Tatum about a- immaterial matter, because the testimony does not show whether the Shay had

the right of way, or whether the 6-spot had the right of way; it only shows that Mr. Tatum give an order to Claud Warren to get the engine down there and back before 6 o'clock.

By the COURT: I overrule the motion of the defendant to exclude. Defendant excepts.

Cross-examination.

(By Mr. BRADY:)

Q. Mr. Parker, Mr. Tatum didn't discuss that,—which engine had the right of way over this track at all?

A. He didn't say anything about the right of way.

Q. He simply told you if Claud Warren had got down there and got the empties before 6 o'clock that there wouldn't have been any trouble?

A. He didn't say 6 o'clock he said if he got there and got them and got back before Pierce got there, there wouldn't have been any trouble.

Q. Well, if he had got there and got them and got back before Pierce got there, he wouldn't have had any trouble, would he?

A. I don't think he would.

Q. But he never told you anything about Pierce wasn't to stop there?

A. No sir.

Q. He never told you the Shay didn't have the right of way?

A. No sir, he didn't say anything about the right of way.

Q. He just said if Claud Warren had gotten there and gotten away before 6 o'clock it wouldn't have happened?

238 A. He said those were the orders he give Warren.

Q. That is true.

By Mr. DENT: We object to the remark of Counsel.

By the COURT: Go ahead.

S. W. PIERCE (White), being called in rebuttal by counsel for plaintiff, and being sworn, on oath, testified as follows:

Direct examination.

(By Mr. DENT:)

Q. Mr. Pierce, you heard what Mr. Tatum said with reference to the conversation had between you and him immediately after this wreck occurred, where you were injured?

A. Yes sir, I heard it.

Q. You heard him deny that he had a conversation with you to that effect?

A. Yes sir.

Q. Now, tell the jury just what was said.

By Mr. BRADY: Objection; this witness, as I remember it on his direct examination that immediately after this wreck Mr. Tatum made three statements.

By Mr. DENT: This testimony is to impeach Will Tatum the

Foreman. He denied he made any such statement to Mr. Pierce, and I think it is competent.

By the COURT: The objection is overruled;—I think it is competent.

Defendant excepts to the ruling of the court.

A. After I was hurt there, Mr. Tatum walked around.

Q. How long after Mr. Pierce?

239 A. I had been laying there three or four or five minutes, I don't know just exactly, but it was just a few minutes, and Mr. Tatum walked around the engine and he said. "When you blew your engine I thought you saw the rear end of those cars".

By the COURT: The court will sustain the objection above, because the witness had already stated when he was on the witness stand and made the answer to the same question that was asked here, and that testimony has gone to the jury and is already in the record.

Exception.

Cross-examination.

(By Mr. BRADY:)

Q. Those empties were there that morning on the "Y", weren't they?

A. They were there; I saw them after I was hurt. I didn't see them before the wreck, but after they were bringing me back into town after I was hurt, I saw them as they were carrying me back; and going out I didn't know there were any empties on the "Y".

Dr. W. W. DAVIS (white), called in rebuttal by counsel for defendant, after being duly sworn, testified as follows:

Direct examination.

(By Mr. BRADY:)

Q. Dr., you have been sworn have you?

A. Yes sir.

Q. Do you remember when this accident occurred, resulting in the injury to Mr. Pierce?

A. Yes sir.

240 Q. State whether or not you treated Mr. Will Tatum for what he complained of as being an injury after that accident?

A. I did.

Q. When were you first called to him?

A. Late in the afternoon of the first day of the accident.

Q. Where was he?

A. At home.

Q. Where was he?

A. In bed.

Q. When did you next go to see him?

A. The next morning.

Q. Where was he then?
A. He was in bed then.
Q. When did you next go to see him?
A. That afternoon.
Q. Where was he then?
A. He was in bed then.
Q. What time in the morning was it you went to see him on the day after the accident?
A. About 8 o'clock, I think.
Q. What time in the afternoon was it you went to see him after the accident?
A. I can't say positively the hour, but some where about 4 o'clock.
Q. He was in bed both times you saw him?
A. Yes sir.
Q. Did you go to see him after that?
A. Yes sir, I went to see him the next day.
Q. Where was he then?
A. He was still in bed.
Q. You live in Ora, do you?
A. Yes sir.
241 Q. He was on the streets of Ora the day after the accident?
A. I didn't see him.
Q. Where was he when you saw him both times?
A. In bed both times.

Cross-examination.

(By Mr. DENT:)

Q. He may have been on the streets and you not seen him?
A. He could have been on the streets, but it is not probable. He was too sick to be on the streets.
Q. I didn't ask you what was probable. I say it was possible for him to have been on the streets and you not seen him?
A. Yes sir, he could have been on the streets?
Q. You are the regular employed physician of the Easterling Lumber Company, and paid a salary by them?
A. Yes sir.
Q. And you have been with them how long?
A. 10 years the first of last May.
Q. You have a great many patients, and you pay no special attention as to just when a man goes to his bed?
A. Some patients I do and some I do not. It depends on the importance of the case or the patient.
Q. There was nothing so very important about Mr. Tatum's case?
A. Yes sir, I remember he was suffering intensely, and I had to give a hypodermic that afternoon, also the next morning, and he thought he was badly injured, but he wasn't and I told him he wasn't.
Q. Have you any record in this case?
A. No sir, except my memory. I keep no record of the cases of that nature. He is on what we call the "list".

Q. You do not undertake to say Mr. Tatum did no- have a conversation with Mr. Ducksworth a short time after this accident, do you?

A. Certainly I do not.

242 Q. You don't know do you?

A. No sir.

Q. How many men are employed by the Easterling Lumber Co. and under your care—You don't know anything about a conversation had between Mr. Tatum and Mr. Ducksworth the day after the accident, and on your oath you can't say whether he did or not, can you?

A. No sir.

Q. How many men have you under your supervision as physician for the Easterling Lumber Co.?

By Mr. BRADY: Objection, incompetent, and irrelevant.

By The COURT: I will sustain the objection.

Q. How many men did you have under your supervision on that day, Docter?

A. I had several.

Q. How many the day before?

Objection. Overruled. Exception.

A. I didn't have very many the day before.

Q. How many the day after?

A. Nearly the same number the day after that I did the day of——

Q. You can't give to the jury on your oath any definite statement with reference to what these patients were doing, except while you were there, can you?

A. I can tell what I was doing and I can tell several patients I saw that day that I remember distinctly.

Q. You can't tell what they were doing in your absence?

A. No sir.

Q. You can't tell where they were or what they said in your absence?

243 A. No sir.

Mrs. W. W. TATUM (white), being called in rebuttal by counsel for defendant, after being duly sworn, on oath testified as follows:

Direct examination.

(By Mr. BRADY:)

Q. Mrs. Tatum, you are the wife of Mr. Will Tatum are you?

A. Yes sir.

Q. Do you remember the accident where Mr. Pierce was injured?

A. Yes sir.

Q. Where was your husband on the day after the accident causing the injury to Mr. Pierce?

A. He was home in bed sick.

Q. Did he leave his bed that day Mrs. Tatum?

A. No sir.
Q. You are positive of that are you?
A. Yes sir, I am.

Cross-examination.

(By Mr. DENT:)

Q. Was he in bed the day before,—on Sunday?
A. No sir.
Q. What time did he take his bed?
A. He taken his bed on Monday. I don't know just what time, but it was after the wreck.
Q. He was up part of the day,—Monday?
A. Yes, of course he was.

By Mr. BRADY:

Q. He was up and went out on the train before the wreck?
A. Yes sir, before the wreck.

244 By Mr. DENT:

Q. Just after the accident, what time—he took his bed what time after the accident?
A. The same day.
Q. Stand aside.

W. W. TATUM (white), defendant, being called in rebuttal by counsel for defendant, and being duly sworn, on oath testified as follows:

Direct examination.

(By Mr. BRADY:)

Q. Mr. Tatum, where were you on the day after the wreck?
A. I was in the bed.
Q. Did you go down town that day?
A. No sir.

(By Mr. DENT)

Q. Stand aside Mr. Tatum.

Plaintiff rests.
Defendant rests.

245 No. 1.

The court instructs the jury for the plaintiff, that if they believe from the evidence that Plaintiff was injured by the negligence of the defendant, while he was exercising due care and while he had the right of way on track in question, then they should find for him and assess his damages in such sum as all the evidence may show he has sustained, if any, in a sum not to exceed twenty five thousand dollars.

**Given.**

Filed 5 day of July 1912. Dan Williamson, Cle-k. By V. T. Deese, D. C.

246 No. 2.

The court instructs the jury for the plaintiff that if they find for the plaintiff and find that he was exercising due care at the time he received his injuries, if any, then they should assess his damages at such sum as the jury believe from the evidence *while* fully compensate him for the injury sustained, if any, and the jury should take into consideration the plaintiff's mental and physical suffering if any; his loss of time while sick and disabled by reason of his injury, if any, his necessary expense, if any, in seeking to be cured, as for medicine, the attention of physicians and other attendants, if any; the perma-nt injury, if any, to plaintiss's body by reason of his wounds failing to heal or by reason of its not healing so as to restore the body or any member thereof or any part of any member thereof to its natural shape or state of health and usefulness and if the jury believes from the evidence that plaintiff suffered damages in any or all of said ways, and the jury find for the plaintiff, holding the defendants therefor, the jury should award the plaintiff such damages as will fully compensate him. And the jury is not to refuse to fix and assess such damages because the plaintiff may have been unable to state what his damages were, measured in dollars and cents, but the jury are to fix the amount at such sum as they may believe from the evidence, in view of all the evidence, *while* fully compensate the plaintiff, and return their verdict accordingly, but not to exceed the amount sued for, to-wit, twenty five thousand dollars.

Given.

Filed 5 day of July 1912, Dan Williamson, Clerk. V. T. Reese D. C.

247 No. 3.

The court instructs the jury for the plaintiff that if they find for the plaintiff, their verdict may be in the following form, to wit: "We the Jury find for the Plaintiff and assess his damages at —— ($—) dollars" (the sum to be fixed by the jury).

Given.

Filed 5 day of July, 1912. Dan Williamson, Cle-k. By V. T. Reese D. C.

No. 4.

The court instructs the jury for the plaintiff that proof of injury inflicted by a corporation or an individual using engines and locomotives propelled by the dangerous agency of steam and running on a track, is prima facie evidence of the want of reasonable skill and care on the part if such party operating said engines or locomotives.

Therefore, if the jury believe from the evidence that plaintiff was injured by defendant Easterling Lumber Company while running

engines and locomotives propelled by steam and running on tracks, then the burden of proof is on Defendant Easterling Lumber Company, to prove by a preponderance of the credible evidence that it was not guilty of negligence in the infliction of such injury, if any was inflicted.

Given.

Filed 5 day of July, 1912. Dan Williamson, Clerk. V. T. Deese D. C.

248 The court instructs the jury for the plaintiff that if you find from the evidence, that plaintiff was injured while in the exercise of due care and that he is entitled to recover, then in estimating his damages, you may take into consideration his age, his health and physical condition prior to the injury, and also his health and physical condition since then, if you believe from the evidence, that his health and physical condition since then *is* impaired as the proximate resul- of such injury; and you may also consider whether or not he has been permanently injured, and to what extent, if any, he has been injured, or marred in his personal appearance; and to what extent, if any, he may have endured physical and mental suffering as a natural and inevitable result of such injury, and *all so* any necessary expense he may have been put to in and about caring for and curing himself, and the value of any time you may believe, from the evidence, he *jas* lost, if any, on account of such injuries, and you may consider what, if any, effect suc*j* injuries may have upon him in the future years of his life in respect to pain and suffering or respect to his power to earn money by his labor, and you should allow him as damages such sum, as in the exercise of a sound discretion, and good judgement, you may believe from all the facts and circumstances in evidence will be a fair and just compensation to him for the injuries, if any, so sustained, in a sum not to exceed twenty five thousand dollars.

Refused.

Filed 5 day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

249 No. 9.

The court instructs the jury for the defendant that if they believe from the evidence in this case that the plaintiff knew the Shay engine had the right of way over the "Y" when the empties were on the "Y" and with such knowledge, without attempting to see or ascertain whether the empties were on the "Y," entered upon the "Y" thereby causing the collision and his injury, then plaintiff cannot, recover.

Given.

Filed 5 day of July, 1912. Dan Williamson, Clerk. By. V. T. Deese, D. C.

No. 10.

The court instructs the jury for the defendant that the burden of proof in this case is upon the plaintiff and he must show by a preponderance of the evidence that his injury was caused by the negligence of defendant and not by his own negligence and unless the plaintiff so shows, that he cannot recover.

Given.

Filed 5 Day of July, 1912. Dan Williamson, Clerk. By. V. T. Deese, D. C.

250 No. 11.

The court instructs the jury for the defendant, that in determining whether the defendant was or was not guilty of negligence causing the injury to the plaintiff, they will not consider the seriousness and painfulness of his injury. That the seriousness and painfulness of his injury can be considered only for the purpose of fixing the amount of damages plaintiff sustained and before he can recover at all, it must be determined that the defendant was negligent and that its negligence was the proximate cause of the injury, and in determining whether there was negligence on the part of the defendant contributing proximately to the plaintiff's injury, sympathy for plaintiff and all pain and suffering endured by the plaintiff should not enter into the deliberations.

Given.

Filed 5 Day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

No. 12.

The court instructs the jury, that there can be no recovery in this case unless they believe the engine No. six had the right of way across the "Y" and unless the plaintiff shows by a preponderance of the testimony that the engine No. six, which he was running, had the right of way over the "Y" on Monday morning then there can be no recovery, even — they may believe the defendant negligent in allowing the Shay engine to be run by John Tatum.

Given.

Filed 5 Day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

251 No. 13.

The court instructs the jury for the defendant that if they believe from the testimony in the case that the plaintiff was thoroughly acquainted with the rules under which defendant's trains were operated and knew or by the exercise of ordinary care might have known that the Shay engine of the defendant was due to go after

the empty cars on Monday morning, and with such knowledge entered upon the "Y" then he assumes the risk by so doing, and cannot recover.

Given.

Filed 5 day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

No. 14.

The court instructs the jury, that although they may believe from the evidence that the defendant was negligent and that its negligence contributed to plaintiff's injury; still if they further believe that plaintiff was negligent and his negligence also contributed to his injury, then in assessing damages for plaintiff they must reduce the damages which he sustained in proportion to the negligence of which he was guilty.

Given.

Filed 5 Day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

252

No. 15.

The court instructs the jury for the defendant that they must in their deliberations disregard everything that they may have heard or seen during the trial of this case except the evidence submitted to them, and the rulings of the court; and that they must lay aside in their deliberations conjectures, suppositions, and every other outside influence which may have a tendency to influence them, and look solely and wholly to the credible evidence and the law in reaching their verdict, and unless they believe from a preponderance of the credible evidence that plaintiff's injury was caused by the proximate negligence of the defendant, the plaintiff cannot recover.

Given.

Filed 5 day of July 1912. Dan Williamson, Clerk. V. T. Deese, D. C.

No. 16.

The court instructs the jury that under the law, the plaintiff cannot recover, though even so permanently and painfully injured, unless his injury was caused by the negligent act of the defendant, and that the burden of proof in this case is upon the plaintiff to show by a preponderance of evidence that his injury was not caused by his own negligence, but was caused by the negligence of the defendant.

Given.

Filed 5 Day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

253 No. 1.

The court instructs the jury that if they believe from all the evidence in the case, that injury to plaintiff was caused by the negligence of a fellow-servant of plaintiff, then the plaintiff cannot recover.

Refused.

Filed 5 day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

No. 2.

The court instructs the jury to find a verdict for the defendant.

Refused.

Filed 5 day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

254 No. 3.

The court instructs the jury for the defendant that, although they may believe from the evidence in the case, that the defendant was negligent; still if they further believe from the evidence that the plaintiff's injury was caused by hi- own gross negligence in violating a rule of the company, then the plaintiff cannot recover, even though the defendant Easterling Lumber Company may not have been free from negligence.

Refused.

Filed 5 day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

No. 4.

The court instructs the jury for the defendant, that if they believe from the evidence in this case, that the injury to plaintiff was caused by the negligent act of an engineer on the Shay engine, failing to obey an order to run his engine to the "Y" before 6 o'clock and the negligence of John Tatum in not leaving the camp on time and in failing to give engine 6 the right of way before 6 o'clock, then his injury was caused by the negligence of a fellow servant and he cannot recover.

Refused.

Filed 5 day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

255 No. 5.

The court instructs the jury for the defendant that if they believe from the evidence in this case that the plaintiff was guilty of contributory negligence and that his contributory negligence was the proximate cause of his injury, then he cannot recover.

Refused.

Filed 5 day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

No. 6.

The court instructs the jury for the defendant that if they believe from the evidence in the case that the injury of the plaintiff was caused by the negligent act of an engineer in failing to obey orders properly given by his superior, then plaintiff's injuries were caused by a fellow-servant, and he cannot recover.
Refused.

Filed 5 day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

256 No. 7.

The court instructs the jury, that if even they may believe from the evidence in this case the defendant or its agents were negligent, still if they further believe from the evidence that the plaintiff, while running the Shay engine allowed his fireman to run the Shay engine to the "Y" for *u*mpties and that he took charge of the Shay at the "Y" and ran it into the camp on Monday morning and while running engine 6 knew that he should stop his engine before en*t*ring the "Y" when the empty cars were on the "Y" but notwithstanding such knowledge ran his engine on "Y" while cars were on the "Y" on the Monday morning the wreck occurred, then the plaintiff cannot recover.
Refused.

Filed 5 day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

No. 8.

The court instructs the jury that the defendant Tatum had no right to change defendant's order giv*e*n the Shay the right of way and plaintiff cannot recover against the Easterling Lumber Company, on account of an injury sustained by plaintiff, caused by the right of way order being changed by Tatum even — they believe he made such a change.
Refused.

Filed 5 day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

257 *Verdict of the Jury.*

We the jury find for the plaintiff and assess his damages at Seventeen Thousand Five Hundred Dollars, (17,500,00).

Filed 5 day of July, 1912. Dan Williamson, Clerk. By V. T. Deese, D. C.

No. 482.

S. W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al.

This day this cause coming on to be heard, in open court, all parties announcing ready for trial, and issue being joined between them, thereupon came a jury of good and lawful men, to-wit: T. B. Holcomb, and eleven others, who being elected, empanneled and sworn, a true verdict to give according to the evidence and having heard the evidence and arguments of counsel and received the instructions of the court, retired to consider of their verdict, presently returned into open court the following verdict, to-wit: We the jury find for the plaintiff and assess his damage at Seventeen Thousand Five Hundred Dollars, ($17,500,00).

It is therefore ordered and considered by the court, that the plaintiff, S. W. Pierce, do have and recover of and from the defendant, the Easterling Lumber Company, a corporation Will (W. W.) Tatum and John Tatum, defendants, said sum of Seventeen Thousand Five Hundred Dollars, ($17,500,00) and all costs in this behalf expended, for which let execution issue.

258 In the Circuit Court of Covington County, Mississippi.

No. 482.

SAM PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendants.

Now comes the defandant- in the above styled case and moves the court to set aside and vacate the judgment of the court and the verdict of the jury rendered in said cause, to-wit:

First. The court erred in refusing to sustain the objection interposed by the defendants to the questions propounded to plaintiff's witnesses, on direct examination, as shown by the stenographer's notes.

Second. The court erred in sustaining the plaintiff's objection to questions propounded to plaintiff's witnesses by defendants, on cross examination, as shown by the stenographer's notes.

Third. The court erred in sustaining plaintiff's objection to questions propounded to defendants' witnesses on direct examination, as shown by the stenographer's notes.

Fourth. The court erred in refusing to sustain the objections of defendants to questions propounded to defendants' witnesses on cross examination, as shown by the stenographer's notes.

Fifth. The court erred in granting to plaintiff instructions marked given, numbered 1, 2, 3, and 4.

Sixth. The court erred in refusing and marking refused the in-

structions asked by the defendants, numbered as follows: 1, 2, 3, 4, 5, 6, 7 and 8.

259 Seventh. The court erred in refusing to allow the defendants to amend their plea filed after plaintiff had rested and before defendants introduced any evidence.

Eighth. The court erred in refusing to grant the defendants the peremptory instruction which they sougth, as shown by the stenographer's notes.

Ninth. The court erred in refusing to sustain the defendants' motion to exclude the evidence sought to be excluded, as shown by the stenographer's notes.

Tenth. The court erred in admitting the testimony tendering to show and showing the negligence on the part of John Tatum, Claud Warren and Will Tatum, because they were fellow servants of the plaintiff, since Chapter 194 Acts of 1908, page 204, is unconstitutional and void for the reasons fully set out in the Stenographer's notes, and for the reasons fully set out in the defendants' special bill of exceptions.

Eleventh. The court erred in refusing to allow the defendant Easterling Lumber Company to amend its plea by giving additional and amended notice under the general issue after the plaintiff rested but before defendants offered evidence, the nature of which additional and amended plea and notice under the general issue, is fully set forth in defendant Easterling Lumber Company's special bill of exceptions filed and allowed by the court.

Twelfth. The court erred in granting to the plaintiff an instruction, under Chapter 215, of the laws of 1912, whereby the burden of proof was, by said instruction, placed upon the defendant Easterling Lumber Company, the jury being instructed thereby that the injuries sustained by plaintiff was prima facie evidence of want of reasonable skill and care on the part of the defendant Easterling Lumber Company.

Thirteenth. The court erred because the verdict was contrary to the law and the evidence.

260 Fourteenth. Because the verdict was excessive.

Fifteenth. The court erred because during the trial of the case the audience, in the presence of the jury, expressed an interest in the case to the extent that some bystander cheered a witness for the plaintiff, slapping his hands while the said witness testified favorable to the plaintiff.

Sixteenth. That the court instructed the jury, while the case was being tried not to talk about the case to anyone and not to separate but remain together. That in violation of the court's instruction not to separate and to *rem*ain together, the said jury did separate and one of the jurors left the other eleven and engaged in a long conversation while separated from them.

Seventeenth. That by reason of the acts of the persons not connected with the trial, in *main*festing an interest in the case, by cheering defendant's witness, Zabe Ducksworth, and by reason of the interest manifested by the audience in the court house in plaintiff's favor in the trial of the case, and by reason of the

separation of the jury and by other reasons to be made known upon the hearing of this motion, especially the fact that the jury was furnished liquor and at least some of the jury was intoxicated, the defendant's rights were prejudiced and the jury was wrongfully influenced in their verdict against the defendant because of said acts and conduct, but for which a verdict would, no doubt, have been rendered in favor of defendant.

Eighteenth. That by reason of the argument made by plaintiff's attorney, R. L. Dent, the defendant did not receive a fair trial said argument being made upon an instruction which reads as follows:

"The court instructed the jury for the plaintiff that proof of injury inflicted by a corporation using engines and locomotives propelled by the dangerous agency of steam and running on a track is prima facie evidence of the want of reasonable skill and care on the part of such party operating said engines or locomotives. Therefore if the jury believe from the evidence the plaintiff was injured by the def-ndant Easterling Lumber Company while
261 running engines and locomotives propelled by steam and running on tracks then the burden of proof is on the defendant Easterling Lumber Company, to prove by a preponderance of the credible evidence that it was not guilty of negligence in the infliction of such injury, if any, was inflicted."

and the jury was told by the said R. L. Dent that the burden of proof was upon the defendant, notwithstanding the instructions read by the defendant's attorney. The law upon which said instruction was based is unconstitutional and void and in violation of the Fourteenth Amendment to the Constitu-ion of the United States, and deprives the defendant of property without due process of law. That said Statute was enacted long after the accident occurred causing the injury to the plaintiff, and the instruction granted upon said law deprives the defendant of property without due process of law, and said instruction placing the burden of proof upon defendant made it utterly impossible for the defendant to secure a fair trial and obtain a verdict at the hands of a jury.

Nineteenth. Because the plaintiff's attorney R. L. Dent, in his concluding argument told the jury that the plaintiff might live twenty years and that *that* he should recover at least one thousand dollars for each year of said twenty years, or such a sum as would earn one thousand dollars a year when placed at six per cent interest, notwithstanding that fact that no evidence was offered or introduced showing the plaintiff's expectancy, and for further argument made by R. L. Dent to juror Holcomb, wherein he told said juror, calling him by *b*ame, that "you have — on jury-s like this before where you rendered a verdict awarding damages for pltf. against a lumber company and that verdict was affirmed by Supreme Court.

Other and further causes to be made known on the hearing thereof.

EASTERLING LUMBER COMPANY,
By J. J. STUBBS &
T. BRADY, JR.

I have this day received and filed, opened same this the 10th of July, A. D. 1912.

DAN WILLIAMSON, *Clerk.*

262 In the Circuit Court of Covington County, Mississippi.

No. 482.

SAM W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendants.

Now comes the defendant, Easterling Lumber Company, in the above styled cause and files this its supplemental motion for a new trial therein and moves the court to set aside and vacate the judgement rendered therein, and for a new trial therein, for the following reasons:

First. The judgment is excessive. The Supreme Court of this state reduced a judgment from $50,000.00 to $30,000.00 in a case where the plaintiff lost both legs, and has never permitted a judgment to stand for as large an amount as that rendered in the above styled case for the loss of one leg.

Second. That the defendant before empaneling the jury in this case, by its attorney T. Brady, Jr., discussed with the plaintiff's attorneys, Messrs. R. L. & E. L. Dent, a settlement proposition and suggested that the case be compromised and offered the sum of Four Thousand Dollars. That just before the jury was empan*n*eled, the defendant's attorney T. Brady, Jr., discussed a question of settlement with plaintiff's attorneys and offered them the sum of Five Thousand Dollars there then arose the question of Hospital or docter's bill in the sum of about Two Hundred Dollars. This amount was discussed at length but was not accepted by plaintiff's attorneys. That during the trial of the case, defendant's attorney T. Brady, Jr., requested to know of plaintiff's attorneys whether or not they would accept the sum of Fifty Two Hundred Dollars. Plaintiff's attorneys declined to accept an*d* less than the sum of Six Thousand Dollars. Defendant's attorneys being without the authority to pay such an amount, the case progressed.

263 That after the case had been gone *o*nto on the following morning a juror not of the panel trying the case, but one who had been excused, stated to T. Brady, Jr., that he thought it would have been wise for the plaintiff to accepted a compromise. This was very annoying to the defendant's attorney T. Brady, Jr., for the reason that the compromise proposition submitted to plaintiff's attorneys were submitted confidentially and were not submitted publicly and were discussed privately with the plaintiff's attorneys and the public was not supposed to be advised thereof. Defendant's attorneys T. Brady, Jr., and J. J. Stubbs, commenced to suspect that probably the jury trying the case would receive such information and T. Brady, Jr., went into the judge's room and in the presence of Judge Hughes and in the presence of R. L. Dent, complained

of the compromised proposition which he had submitted to the plaintiff's attorneys being a current topic of conversation. The defendant's attorney T. Brady, Jr., was extremely careful in discussing the matter with the plaintiff's attorneys and never even discussed it in the presence of his associate, Mr. Stubbs, but left the said Stubbs with the statement that he had authority to pay as much as Fifty Two Hundred Dollars and discussed it with plaintiff's attorneys alone. That the said T. Brady, Jr., called the judge's attention to the fact that the compromise report was current and complained before the judge in the presence of the said R. L. Dent, to which the said R. L. Dent responded that he had never been very busy during the term of court with other matters fearing that the jury had been advised of a compromised proposition, the defendant's attorney T. Brady, Jr., requested an instruction and stated to the court at the time that his reasons for so doing was that he did not want his case to be affected by improper influences which might have reached the jury. That the couort granted the instruction, which is in the following words:

The court instructs the jury for the defendant that they must in their deliberations disregard everything that they may have heard or seen during the trial of this case except the evidence submitted to them and the rulings of the court, and they must
264 lay aside in their deliberations conjectures, suppositions, and every other outside influence which may have a tendency to influence them, and look solely and wholly to the credible evidence and the law in reaching their verdict, and unless they believe from a preponderance of the credible evidence that plaintiff's injury was caused by the proximate negligence of the defendant, the plaintiff cannot recover.

That defendant is advised that the compromise was discussed or mentioned by some of the jury.

Other and further causes to be made known on the hearing of this motion.

EASTERLING LUMBER COMPANY,
By J. J. STUBBS,
T. BRADY, JR.,
*Defendant's Attorneys.*

STATE OF MISSISSIPPI,
*County of Lincoln:*

Personally came and appeared before the undersigned Circuit Clerk, T. Brady, Jr., who being duly sworn says that the facts, as he recollects them, set forth in the foregoing supplemental motion for a new trial are true as therein stated. That he has a positive and distinct recollection on the subject of having offered the plaintiff's attorneys a compromise of $5,000.00 and of having discussed the sum of $5,200.00. That the compromise proposition was not excepted and that he complained of plaintiff's attorneys, in the presence of the court, about the compromise proposition being made public.

T. BRADY, JR.

Sworn to and subscribed to before me this the 18th day of July, A. D. 1912.

ELWOOD SMITH, *Clerk.*

Filed 19th day of July, 1912.
DAN WILLIAMSON, *Clerk.*

265

No. 530.

S. W. PIERCE
vs.
EASTERLING LUMBER COMPANY.

*On Motion of Defendant for a New Trial, Which was Filed and Heard by the Court on July 17th, 1912.*

Appearances:

Hirsh, Dent & Landau, Vicksburg; Hon. E. L. Dent, Collins, Counsel for Plaintiff.

Messrs. Brady & Dean, Brookhaven; Hon. J. J. Stubbs, Collins, Counsel for Defendant.

(Mr. Brady, who was leading counsel for the defense in this case, is now detained in the Circuit Court of Lincoln County where he has case- he cannot get away from, and therefore is not presence on the presentation of this motion for a new trial.)

T. J. HUFF (white), being called as a witness by counsel for defendant, and being sworn testified as follows:

Direct examination.

(By Mr. STUBBS:)

Q. Your name is T. J. Huff?

A. Yes sir.

Q. You were on the jury that tried the case beatween Sam Pierce and the Easterling Lumber Company?

A. Yes sir.

Q. Mr. Huff state to the court, if you know whether that jury separated during the time after they were empanneled or not?

266 A. You mean in what way?

Q. I mean whether anyone left the jury, where you all didn't see one another or out of the sight or hearing of each other?

By Mr. DENT: I object, unless he says he was there in charge of bailiff.

Overruled. Exception.

A. Not out of sight that I know of, Mr. Stubbs.

Q. Were you in sight at all times?

A. We were while I was awake, I couldn't say when I was asleep.

Q. Do you know whether or not any of the jury left the room or not at night?

A. I do not.

Q. In charge of a bailiff or otherwise?

A. I do not.

Q. In taking your meals do you know whether the jury were together when you took your meals or not, or some of them were absent?

A. We were, except one time.

By the COURT:

Q. You mean you were together except one time?

A. Yes sir. It happened this way. We taken our first meal at Mrs. Lowry's and the table wouldn't hold all of the jury, and I think there was one or two we all eat under one guard, and then the other jurors eat at one time under the other guard while he was with him.

Q. When you say "we all eat," do you remember of 11 eating, leaving one Mr. Lee out?

A. I think that was the time I mentioned.

267 Q. You didn't see him did you?

A. We could have seen him if we had wanted to, he was in the dining room and we retired to the gallery, and the doors opened into the dining room, and we were there. It really wasn't a separation, the way I see it.

Q. Wasn't he on the far edge of the gallery—where was Mr. Lee—on that Gallery while you were eating at the Lowry House?

A. He was on the gallery we just had left, as far as I know.

Q. Was it next to where Walter Magee lives?

A. I don't know where he lives.

Q. Was it next to the jail?

A. That is where we left him. I didn't look back; I went into the table and eat.

Q. Did you see him any more until you came out from your meal?

A. I couldn't say that I did.

Q. Do you know whether he went up in town or not?

A. No sir, I don't.

Q. You don't know whether, while you all were eating, he went up town or not?

A. No sir.

Q. State to the court what you know, if anything, about any of the jury having any intoxicants while you were on that panel?

A. I know absolutely nothing.

Q. You stayed at night in the do-mitory, didn't you?

A. Yes sir.

Q. After you retired, did part of the jury stay up?

A. Well, the first night they did stay up longer than I did; I retired early. I didn't sleep it gave me the headache and makes me sick to stay in a room where men are smoking, and for that reason when I entered the dormitory I went to the far side where there was two windows, and sat at the bed and pulled off my shoes. I went to that particular bed and wanted to hold it to get the benefit

of the breeze from the far side of the dormitory, and I didn't
268 know what they did. I heard the men talking. I remember Mr. Kelly telling something that amused me. I don't know what they did but they stayed up.

Q. While you were laying there on that bed with your face turned out the window, did you hear anything said about any liquor?

A. No sir.

Q. Did you hear them opening any bottles?

A. No sir.

Q. Did you smell any whiskey?

A. No sir.

Q. Just before you laid down did Lee return from being gone?

A. He hadn't been gone, if he had, I don't know anything about it.

Q. I mean J. H. Lee? There was two Lees on that jury?

A. If he had been gone, it was more than I know Mr. Stubbs.

Q. At any time Mr. Huff after you were empanneled on that jury did you see any of the jury with liquor, or any liquor among them?

A. No sir, I certainly did not. If they had any liquor they didn't show it to me, and I didn't see any.

Q. With reference to the separation, did you- answer apply to the entire time you were empaneled, or just that night?

A. The entire time I never saw any liquor.

Q. I am talking now about the separation?

A. No sir, we didn't separate.

Q. Mr. Huff you feel perfectly free to testify in this matter don't you?

A. I certainly do; yes sir.

Q. Has anybody talked to you about the case since you come this morning?

A. No sir. I have heard it discussed. It has been a topic of discussion every since the verdict was rendered. I heard it discussed in several places here and in Seminary.

269 Q. I will ask you this: If you didn't make the statement this morning after you got to town, that J. H. Lee left the room one night while you were on that panel, and was gone for more than two hours?

A. I didn't make it, no sir. I can tell you what I did say about it, if you want me to.

By the COURT: Go ahead and state it.

A. I said such report was out; that I had heard that he did, but if he done it I don't know it.

By Mr. DENT: We move to exclude that.

By the COURT: Let it go in the record.

Q. Then you tell the court you didn't tell Mr. B. S. Lowry that of your own knowledge he left the jury and was gone for an hour or two hours one night, and you didn't know where he was?

A. No sir, I didn't tell Mr. Lowry such a thing. I told him just what I told you—that I heard such a thing—that is just exactly what I told Mr. Lowry.

Q. Did you hear that from the members of the jury?

A. I couldn't say I have heard that reported several times since the case was tried, that Mr. Lee was out two hours a certain night, and I have said every time if he was out it is beyond my knowledge, and it is a fact that if he was out it was beyond my knowledge. I will admit he could have been out while I was lying there and me noe know it, but if he did I didn't know it.

Q. Will you say you didn't further make the statement this morning to Mr. Lowry that when he came back in the room, having been gone this length of time, that your face was to the window and you didn't turn over, but you heard them talking about whiskey?

A. No sir, I didn't make any such a statement.

Q. Do you tell the court you didn't see any whiskey at all while you were with the jury?

270 A. No sir, I didn't.

Q. Was there anything stated in your presence by J. H. Lee or any other member of the jury as to what compromise was offered in this case?

A. No sir, I never heard anything about a compromise until after we had rendered the verdict that evening, then I was told of the compromise offered.

Q. My questions are all directed to the time while you were on the jury, Mr. Huff?

A. No sir, I never heard anything of the compromise at all.

Cross-examination.

(By Mr. DENT:)

Q. Mr. Huff, you were on that jury for practically three days weren't you?

A. Yes sir, about three days.

Q. Can't you say on your oath that so far as you observed, that the integrity of that jury was absolutely unquestionable, and that every act of ever member was perfect, as far as you saw--I mean his acts in the jury room were absolutely square?

A. That is what I contend. As far as I know the acts of that jury were absolutely square.

Q. You never talked about this case in the jury box, did you?

A. I- wasn't discussed among the jurymen.

Q. You obeyed the instructions of this court, didn't you?

A. Yes sir.

Q. You and the other gentlemen?

A. Yes sir.

271 J. B. JORDAN (white), being called as a witness by counsel for defendant, and being sworn, on oath testified as follows:

Examination by Mr. STUBBS:

Q. Your name is J. B. Jordan?

A. Yes sir.

Q. You were on the jury that tried the case of Pierce vs. the Easterling Lumber Co., were you, Mr. Jordan?

A. Yes sir.

Q. State to the court what you know, in anything with reference to the jury separating at any time during the time you were on the panel; whether they were all together at all times, or not?

A. I think we were together nearly all the time.

Q. What do you mean by "nearly"?—were you separated part f the time?

A. The first night I think there were two of the jury left the room.

Q. Where did they go?

A. I don't know they went out the door; I don't know where they went.

Q. How long did they stay?

A. I don't know I don't think both of them went out at the same time.

Q. Which one of the jury left the room?

A. Mr. Lee left the room.

Q. J. H. Lee?

A. Yes sir.

Q. How long was he gone Mr. Jordan, to the best of your knowledge?

A. I expect he was gone an hour.

Q. When he returned what did he bring with him, if anything?

A. He never brought anything that I know of.

Q. What was his condition when he returned?

A. Mr. Magee was with him.

272 Q. That was one of the bailiffs?

A. Yes sir.

Q. And he left the jury and was gone an hour?

A. Yes sir.

Q. At night?

A. Yes sir.

Q. What was his condition when he came back with reference to being drunk or sober?

A. I don't suppose he was drunk, I don't know anything about that.

Q. Did you smell his breath?

A. No sir.

Q. Did you see any signs of any intoxicants there that night among the jury?

A. No sir.

Q. Did he go out any more that night?

A. I don't think he did no sir.

Q. Where did he leave you from, Mr. Jordan?

A. He left us in the room.

Q. What other juryman left?

A. Mr. Holcomb.

Q. How long was he gone?

A. I expect he was gone nearly an hour.

Q. What was his condition when he returned?

A. I never noticed any difference. Me and him lay on the same bed together, and I never noticed any difference.

Q. Did you hear any remark made by either of them with reference to whiskey?

A. No sir.

Q. Did you hear any remarks made by any members of the jury with reference to whiskey?

A. No sir.

Q. Did Holcomb tell you where he had been?

273 A. No sir.

Q. Did Lee?

A. No sir.

Q. Where was J. T. Huff during that time?

A. He was lying on the bed close to where I was.

Q. Was he awake or sleep?

A. He said he didn't sleep any.

Q. Down where you took your meals, Mr. Jordan,—do you know anything about any separation of the jury down there?

A. Yes sir. There was a sick man one day that couldn't eat dinner and he sat by the door.

Q. What was his name?

A. Meaders I think.

Q. What was his condition with reference to being drunk or sober?

A. He wasn't drunk, no sir.

Q. Isn't it a fact that eleven of you men eat one time when Mr. J. H. Lee didn't eat?

A. I think so.

Q. Do you know where he was during that time?

A. No sir.

Q. Do you know whether he went up in town or not?

A. No sir.

Q. One night at supper you remember to have taken your meal, eleven of you, and Mr. Lee not there?

A. Maybe that was the time I was thinking about:—it was one time.

By the COURT: Was it night you took the meal and he wasn't there?

A. I don't know whether it was night or noon.

Q. Do you know where you all left him when you went in to take your meal?

274 A. Out on the gallery, I reckon. I heard something said about Mr. Lee being sick and he didn't go in to eat with us but the marshal stayed out there with him.

Q. You mean one of the bailiffs?

A. Yes sir.

Q. Do you know where he and one of the bailiffs stayed out there with reference to the dining table?

A. No sir.

Q. What bailiff stayed out there with him?

A. I don't know which one it was.

Q. How many bailiffs did you have?
A. Two.
Q. Was that Joab Odum and J. C. Magee?
A. Yes sir.
Q. Which one was it stayed with him?
A. I don't know which one it was.
Q. Did a bailiff go with Holcomb when he went out of the room?
A. Yes sir, Odum.
Q. And Magee went with the other?
A. Yes sir.
By the COURT: Was there any protest raised against them going?
A. No sir.
Q. Were they in the closet an hour?
A. I don't know where they were.
By the COURT: About how long were they out?
A. I think they were out an hour.
Q. How long did you state they were out?
A. About an hour. Mr. Lee was out fully an hour, I am satisfied.
Q. Was there anything discussed before the jury with reference to a compromise of this matter?
275 A. No sir.
Q. As to what had been offered as a compromise?
A. No sir.
Q. Do you recall after you eat your supper that night as to whether Mr. J. H. Lee made a statement before the jury as to what they had offered in compromise, or not?
A. I never heard anything of it. I heard such talk as that in the room after we retired to make up our verdict.
Q. You heard talking about a compromise?
A. Yes sir.
Q. What was said about a compromise?
A. I forget just how he said that. We hadn't decided anything but were talking it over, and he said something about going to tell us what they had offered for a compromise.
Q. Who told you that?
A. Mr. Lee. He didn't tell what it was, and I says "Don't tell us what it was; wait until we settle this matter."
Q. He started to tell the jury what had been offered in a compromise?
A. Yes sir.
Q. And you stopped him?
A. Yes sir, he never did tell it; he never did tell me?
Q. Do you know whether he told any other members of the jury or not?
A. I don't know whether he did or not; I didn't hear him tell any of them.
Q. That was while you were deliberating on this case before you had reached and verdict?
A. Yes sir.

Examination by Mr. DENT:

Q. Mr. Jordan, you had to compromise to get together in the v-rdict, didn't you?

A. Yes sir.

276 Q. And this matter about the compromise was just what the jurors were talking about, getting together?

A. He mentioned that compromise before we ever got together.

Q. Nothing was mentioned by Mr. Magee, or anybody else as to what offer of compromise was made, or any amount, did he?

A. No sir. We were speaking about first whether the boy was entitled to any damage or not, and he spoke and said something about what they had offered as a compromise, and then I told him not to mention it.

By the COURT: You mean what the mill company had offered?

A. Yes sir.

Q. There was no offer of compromise discussed in the presence of the jury there at that time?

A. No sir.

Q. You have told everything that happened?

A. Yes sir.

Q. You don't know whether he had any knowledge of a compromise or not?

A. No sir.

Q. You had an instruction not to regard that, didn't you?

A. Yes sir.

Q. And you did that, and every juror so far as you know, did it?

A. Yes sir.

Q. You don't mean to say Mr. Holcomb and Mr. Lee were out more than an hour, on your oath, do you?

A. Mr. Lee was out an hour.

Q. You kept no time?

A. No sir.

Q. You don't know but what the deputy was with him?

A. No sir.

277 Q. Every juror going to relieve himself had to get out of sight of the other jurors to relieve himself, didn't he?

A. There is a closet inside the room there.

Q. The bailiffs were with him?

A. Yes sir.

Q. No juror went away but what was in charge of the bailiffs did he?

A. Not that I know of.

Q. You say you didn't see, smell or taste any liquor there?

A. No sir.

Q. And so far as you know the integrity and uprightness of every man on that jury was perfect, so far as you know?

A. Yes sir.

Q. You didn't see, smell or taste any liquor?

A. No sir.

Q. And everything else was perfect so far as you know—and order

and decorum was concerned, and the case wasn't discussed at all except as you have mentioned?

A. Yes sir.

By Mr. STUBBS:

Q. Did you say there was a closet inside the dormitory, that they didn't have to go out?

A. Yes sir.

Q. He could have relieved himself without going out of the dormitory, couldn't he?

A. Yes sir.

T. B. HOLCOMB (White), Being called by counsel for defendant and sworn, testified as follows:

Examination.

(By Mr. STUBBS:)

Q. Mr. Holcomb you were a member of the jury in the case of S. W. Pierce versus the Easterling Lumber Co. and others?

A. Yes sir.

278 Q. Tell the court what you know if anything, with reference to the jury separating while they were empanneled on that case?

A. I don't know anything as to their separating at all.

Q. Do you mean by that that they were all together where you could see all the jury all the time?

A. As far as I know, yes.

Q. You never separated from them yourself?

A. No sir.

Q. You were where you could see them at all times?

A. Yes sir, unless it was at night, that color yonder (indicating) the outside door was closed, and it might have been that some stepped into the closet sometime. One of the inside closets got so it wouldn't work, and I think someone—I did myself, step into this closet, but the bailiffs were at the door at the time.

Q. When you took your meals at Mr. Lowry's did you all take your meals together there?

A. Yes. The first time we went down to eat the table wasn't long enough for us all to eat, and part eat and the other part set right in at the door, and one of the bailiffs stayed with them and the other part eat, and the next time they made the table long enough, and we all eat at once.

Q. Did you all eat but J. H. Lee, and he didn't eat?

A. One of them was sick and he taken a cup of coffee just in at the door.

Q. Do you know anything about whether he was left out on the gallery while the other 11 men were eating?

A. I couldn't say, and I don't just recollect.

Q. You don't know where he was when you were eating, do you?

A. Which one?

Q. Mr. J. H. Lee?

A. I couldn't testify because I don't know.

Q. That was your supper meal and it was about dusk, wasn't it?

Objection; leading.

279 By the COURT: Don't lead your witness.

A. I don't remember that I could say.

Q. Can you tell this whether Mr. Lee went up town or not?

A. I don't think he did.

Q. Can you say that you know he didn't?

A. He was there when we left and *went* we went there.

Q. When you went into your meal he was there, and you didn't see him any more until you came out?

A. Being a big crowd together I would have had to go over it and noticed it to have told. I noticed when we left there we were always carful to notice that we had all of our party.

Q. Up here at the dormitory—I believe you say you didn't leave there at all?

A. No sir, I didn't.

Q. Were you out of sight of any of the jury?

A. Nothing more than to step into that closet.

Q. How far was that closet from the other jurors?

A. Just from the door inside of it.

Q. How long dod you stay in there?

A. Just a few minutes.

Q. You didn't stay in there something like an hour?

A. No sir—I think not.

Q. Who was with you when you went out?

A. There wasn't any one at all. The two bailiffs were at the door at the time.

Q. And you didn't go out of there with Mr. Odum at all?

A. No sir.

Q. J. B. Jordan was on that jury wasn't he?

A. Yes sir.

Q. Has any body talked to you about this case, since you have been summoned here?

280 A. No sir, no more than just——

Q. Do you feel perfectly free to talk about this case and testify?

A. Yes sir.

Q. Do you have any apprehensions if you separated or anything and tell the court, that you would be punished or anything like that?

A. No sir.

Q. On that night did any member of the jury leave the room?

A. No sir, not that I know of at all.

Q. Did you pay close attention, or do you know whether they left?

A. They were fiddling—some of the boys were playing music in there.

Q. Was there any drinking?

A. No sir, not a bit that I know anything about.

Q. But they were fiddling?

A. Yes sir.
Q. Who was fiddling?
A. Mr. Lee was.
Q. Mr. J. H. Lee?
A. Yes sir, the first part of the night.
Q. What do you know about the drinking?
A. I don't know anything about it at all.
Q. Do you remember Mr. L. F. Lowry asking you if you were not drinking and you told him it was medicine you were taking?
A. No sir, I don't remember that.
Q. That it was medicine he smelled on your breath?
A. I expect you have a mistake in that; he ask- me in regard to the man that drank the cup of coffee, Mr. Meaders was sick, and Mr. Huff fixed a prescription, and we all went down very early and got the medicine, and he taken a drink of it, and when he went to
281 breakfast he didn't want any breakfast but called for a cup of coffee, and after we had got through the case Mr. Ben Lowry came to me and ask- me if the man was drinking. I says "Not a thing I know of," and he says "I thought I smelled whiskey when I went to give him a cup of coffee," and I says "I expect you were mistaken about that, because he had taken some medicine and had another dose then;" I says "He was sick."
Q. In your deliberations did you talk about the case except when you were in the room?
A. No sir.
Q. Did you hear anything about a compromise, or what compromise had been offered before the re-dering of the verdict?
A. No sir.
Q. Do you remember Mr. J. H. Lee stating what the Easterling Lumber Co. had offered before you rendered any verdict?
A. No sir, I don't know that I do.
Q. Do you know that you do not?
A. Yes, I do.
Q. You say you didn't hear him say anything about it?
A. Yes sir.
Q. Mr. Holcomb do you remember the concluding argument of Mr. Dent?

Objection. Sustained. Defendant excepts.

Q. Do you remember of R. L. Dent in making his concluding argument for the plaintiff in this case stating to you that you had been empaneled on a jury of this nature before, and had rendered a verdict against a Lumber Company for damages, and that the Supreme Court had upheld and affirmed that verdict?

Objection. Sustained.

282 Examination.

(By Mr. DENT:)

Q. Mr. Holcomb, how old are you?
A. 52.
Q. You were sworn to obey the instructions of the court. Don't

you say on you- oath now to this court that you did obey those instructions as nearly as possible?

A. I do.

Q. If you went in the closet you were with the bailiff, and you didn't keep any time how long you were in there?

A. I didn't keep any time but I know I didn't stay there very long.

Q. It is not an unreasonable thing for a man to stay for *for* a while on the stool, is it? Sometimes he stays quite a while?

A. Oh, yes.

Q. So far as you know there was no separation of this jury?

A. No sir.

Q. There was no outside influence or communication by anybody?

A. No sir.

Q. And the bailiffs didn't discuss it with any of the jurors?

A. No sir.

Q. And so far as you know you were there one of the 12, and that was an upright verdict, and there wasn't the slightest happening to question the integrity of the action of that jury;—isn't that true?

A. That is a fact.

Q. You say there was no separation of the jury at all, that Mr. Lee was at the hotel with the jurors all the time?

A. Yes sir, so far as I know.

Q. If he was out there, he was there with another bailiff—isn't that true?

A. Yes sir.

Q. He was in charge of a bailiff there—Mr. Odom or Mr. Magee?

A. Yes sir.

283 Q. You know these gentlemen, don't you?

A. Yes sir.

Q. You have known Mr. Odom and Mr. Magee for a number of years?

A. Yes sir.

Q. You say nothing was said in the jury room about any compromise that had been offered by the Easterling Lumber Company, so far as you know?

A. No sir.

Q. You did have to compromise to get together, and you give your best judgment abou- the way to arrive at a verdict?

A. Yes sir.

Q. And some compromise their ideas in order *the* meet the views of others?

A. Yes sir.

Q. And you made concessions and others made concessions to get 12 men together, and that is the only *was* the compromise was mentioned?

A. That is the way it was talked there.

Q. You don't know, as a matter of fact, whether they ever offered any compromise?

A. No sir.

Q. And you say on your oath there wasn't the slightest influence

brought to bear by the Easterling Lumber Company or the plaintiff in this case or their attorneys to taint this verdict in any way?

A. No sir.

By Mr. STUBBS:

Q. Was there any outside influence brought to bear on you to make you make concessions in the case, in arriving at the verdict?

A. No sir.

By Mr. DENT:

Q. They have it in this motion for a new trial here, that the acts of the public in slapping hands, or something of the kind
284 state what effect that had on the jury?

A. Not a bit with me.

Q. If there was a hand slapping, didn't that occur, as a matter of fact, on account of a little repartee between Mr. Ducksworth and Mr. Brady?

A. Yes sir.

Q. And didn't the court reprimand the man that did it?

A. Yes sir.

Q. And there was no other weight brought to bear at all on the jury by any demonstration by the public? Isn't that true?

A. That is a fact.

Q. And the court maintained order all during the trial?

A. Yes sir.

Q. Have you ever seen a case tried any more fairly than that case was tried?

A. No sir, I never did.

Q. Now, Mr. Holcomb, it is charged here that the jury was furnished whiskey, and some of the jurors were drunk or intoxicated. Tell the court whether this is true or not?

A. It is not true.

Q. None was furnished you or brought to the jury?

A. No sir.

By Mr. STUBBS:

Q. Do you mean it is not true they were not drunk or intoxicated?

A. It is not true as to their having any whiskey that I know anything of at all.

By Mr. DENT:

Q. Tell the court whether any of the jurors were drunk or intoxicated?

A. Not at all; if they had a drop I didn't know it.

Q. And every juror, so far as you know, was scrupulous in obeying the orders of the court?

A. Yes sir.

285 L. A. COLLINS (white), being called by counsel for defendant, and duly sworn, on oath testified as follows:

Examination by Mr. STUBBS:

Q. You- name is L. A. Collins?
A. Yes sir.
Q. You were on the jury that tried the case of S. W. Pierce v. Easterling Lumber Company an- others at this term of the court?
A. Yes sir.
Q. State to the court what you know if anything with reference to the jury being separated?
A. If they separated I didn't know it.
Q. Did they stay together all the time?
A. There is one case they might be called separated.
Q. What was that?
A. There was one man on the jury that was sick.
Q. Who was that?
A. Scott Meaders. And he couldn't stand to go to the table one day to eat, and he was brought in and set close to the table but didn't go right up to it with us.
Q. Do you mean to tell the court you know where all the members of the jur- were during the whole time you were empanneled?
A. No sir. Because while I was asleep I couldn't tell where they were at.
Q. Do you know whether or not they left the room or not—Mr. J. H. Lee——
A. If he did I didn't know it.
Q. Do you know whether Mr. Holcomb left the room or not?
A. If he did I didn't know it.
Q. When you took your meals around do you know whether 11 of you eat your meals at one time, and Mr. Lee didn't go in? Do you remember anything about that?

286 A. No sir, I don't.
Q. You didn't pay any attention to that?
A. I don't remember of but one man failing to eat, and that was that sick man.
Q. Do you know anything about any whiskey being used by the jury?
A. No sir, I don't if there was any there I didn't see it or smell it.
Q. Did you hear anything during the time you were empanneled and before you reached a verdict as to what the Easterling Lumber Company had offered as a compromise in this case?
A. I don't believe I did.
Q. Didn't Mr. J. H. Lee tell you what they had offered for a compromise in the case before you ever reached any verdict; don't you remember that?
A. I don't believe I did, I think that was on Friday evening I remember hearing this.

Examination by Mr. DENT:

Q. That was after the verdict was rendered?
A. Yes sir.

By Mr. STUBBS:

Q. Do you tell the court that was said or not before the jury reached a verdict?

A. If it was I don't remember it.

Q. You don't know whether it was said to some other member of the jury or not?

A. No sir, I don't, it could have been said to them and me not heard it.

Examination by Mr. DENT:

Q. Mr. Collins how old a man are you?

A. 33.

287 Q. You were instructed by Judge Hughes, weren't you, when you were put on the jury, what to do?

A. Yes sir.

Q. Now, will you tell the court on your oath as to whether or not you complied with those instructions as near as you could possibly do it?

A. Yes sir.

Q. Tell the court on your oath Mr. Collins, what outside influence, if any outside of the law and facts as developed on the witness stand had on you, while you were performing your duty as juror under oath as best you could?

A. There didn't anything have any effect on me.

Q. What outside influence was brought to bear by any demonstration made in the court room—You saw no demonstration, did you?

By the COURT: That cuts no figu-e.

Q. Now, Mr. Collins, you say you heard nothing of whiskey and smelled no whiskey, and all the jurors were sober, weren't they?

A. As far as I know.

Q. There wasn't the slightest impropriety in the acts of any of them, was there?

A. No sir.

Q. You did have to make concessions in the jury room for and against the Easterling Lumber Company to get together, didn't you?

A. Yes sir.

Q. And if anything was said about a compromise, it was in that way?

A. Yes sir.

Q. Mr. Lee didn't tell you of any offer of a compromise being made, did he, so far as you know?

A. So far as I know he did not.

288 Q. And no outside influence was brought to bear at all in any way?

A. No sir.

Q. That is a perfectly correct and upright verdict so far as you know?

A. Yes sir.

Q. At the hotel there wasn't the eating capacity for all the jurors, was there, but you were in charge of bailiffs all the time?
A. Yes sir.
Q. A man might go in the closet and stay some little time?
A. Of course he might; I never paid no attention.
Q. One of the closets got out of order in the room you were in, didn't it?
A. I remember some of them say that it did.
Q. And you had to use the other closet which was at the outer door, didn't you?
A. Yes sir.
Q. And you used it with the bailiffs there standing guard, didn't you?
A. Yes sir.
A. And the other men did that?
A. Yes sir.
Q. And you paid no particular attention to how long they stayed, or anything about it?
A. No sir.
Q. Whether they stayed half hour, an hour or two hours, you don't know anything about that?
A. No sir.
Q. But you know so far as you are concerned, and so far as the other men were concerned, there was no communication at all with the outside world?
A. So far as I know there was not.

289 By Mr. STUBBS:

Q. Has anybody been talking to you since you came today, as to what the evidence should be?
A. No sir, not as to what the evidence would be.
Q. I mean any members of the jury?
A. No sir.

SCOTT MEADERS (white), being called as a witness by counsel for defendant, and duly sworn testified as follows:

Examination (by Mr. STUBB:):

Q. Your name is Scott Meaders?
A. Yes sir.
Q. Are you one of the members of the jury that tried the case of S. W. Pierce vs. Easterling Lumber Co.?
A. Yes sir.
Q. Tell the court what you know, if anything, with reference to the separation of the jury during the time you were empanneled?
A. I don't know they separated.
Q. Were you where you could see every member of the jury at all times, except while you were sleep?
A. Yes sir.
Q. You tell the court now, Mr. J. H. Lee was with you all the time, at the dinner table and everywhere else?
A. Yes sir, I think he was, if he wasn't I didn't miss him.

Q. You didn't miss him?
A. No sir.
Q. Do you know whether he was with you or not, the second night at the supper table?
A. Yes sir, I think he was.
Q. I mean at the table; I don't mean wasn't he at the house?
A. Yes sir, I think he was at the table.
Q. Do you know?
290 A. I a-n't right sure about it.
Q. Well, at any time in the night do you know whether any of the jurors left the room, or not?
A. If they did they left after I went to sleep.
Q. You don't know whether any of them left or not?
A. I don't think they did.
Q. What about any liquor in there?
A. If there was any in there I didn't see it.
Q. Did you get sick?
A. Yes sir, I did.
Q. Was that from drinking?
A. Yes sir, from drinking ice water.
Q. You tell the court you were not intoxicated at all?
A. Yes sir, I haven't taken a drop of whiskey in 7 months.
Q. Did you hear anything said about Mr. Lee or any one else with reference to what the Easterling Lumber Company had offered for a compromise before you rendered a verdict?
A. No sir.
Q. Who summoned you in this case this time, Mr. Meaders?

By Mr. DENT: We object to that the summons will show.

Q. I mean what officer served the summons on you?
A. Mr. Jessie Dossett for one and Mr. Rutland.
Q. Where did they find you?
A. At Sanford.
Q. And you were not at home?
A. No sir.

Examination by Mr. DENT:

Q. Mr. Meaders, you were sworn to obey the instructions of the court, and the evidence in this case?
A. Yes sir.
Q. And on your oath you did that as best you could?
A. Yes sir.
291 Q. And every other juror did that so far as you know?
A. Yes sir.
Q. Have you ever served on juries before?
A. Only in Justice Court.
Q. Tell the court what outside communication was had with that jury or with you?
A. If there was any I never knew it.
Q. The acts of those men were in accord with the instructions of the court?
A. Yes sir.

Q. And every man on the jury did the best he could?
A. Yes sir.
Q. You went out like other members of the jury and used those closets, didn't you?
A. Yes sir.
Q. And the bailiffs were there and went with them?
A. Yes sir.
Q. And there was no communication by the sheriff with reference to this suit?
A. None whatever.
Q. And if you wanted anything you got it didn't you?
A. Yes sir.
Q. You say there was no whiskey there and no outside influence brought to bear on you while you were on that jury?
A. No sir.
Q. It is not a big dining room over there was it?
A. No sir.
Q. And of necessity some of you had to sit down and eat while others waited?
A. I think they all eat but two meals. I missed myself, and I sat right there in sight of both of the bailiffs. I couldn't eat.
Q. They charge there was drunkenness on that jury, tell whether that is true?
292 A. It is not true.
Q. Tell the court whether you were made drunk by whiskey therer?
A. No sir, I wasn't.
Q. Tell the court whether the jury was furnished any whiskey?
A. They were not furnished any, and if they had a drop I didn't see it.
Q. You had none.
A. No sir.
Q. And you didn't smell any?
A. No sir.
Q. You were a sick man part of the time?
A. Yes sir.
Q. There is nothing unusual about that, is there?
A. It generally makes me sick every time I have to drink ice water. I am used to drinking warm water, and that cold water went against me.
Q. You acted in you- deliberations in the jury room by the instructions of the court, and the evidence in the case, and upon that you made up your verdict?
A. Yes sir.

*Q.* Stand aside.

J. A. KELLY (white) being called as a witness by counsel for defendant, on oath testified as follows:

Examination (by Mr. STUBBS):

Q. Your name is J. A. Kelly?
A. Yes sir.

Q. You were a member of the jury that tried the case of S. W. Pierce vs. Easterling Lumber Company at this term of court?

A. Yes sir.

Q. Tell the court what separation, if any, the jury indulged in during the time you were empanneled during the trial of that case?

293 A. There wasn't any.

Q. Were the jury always in sight while you were on that jury?

A. Yes sir.

Q. There wasn't a one, the- but what could see any of them?

A. They would go to the closet sometimes.

Q. Would they stay an hour when they went to the closet?

A. No sir.

Q. Did you see Mr. J. H. Lee separate from his fellows and leave?

A. Just as I told you while ago.

Q. Do you know where he went when he went out?

A. Yes sir, the bailiff was with him.

Q. But, do you know where he went to?

A. I was satisfied where he went, I didn't get up to look.

By the COURT: Where did you say he went?

A. To the closet.

Q. How long did he stay out?

A. I don't know just a few minutes.

Q. Was that at night?

A. Yes sir.

Q. Down at the hotel where you took your meals, did he separate from you there, and 11 of you eat at one time and he eat afterwards?

A. Yes sir.

Q. Where was he when you 11 were eating?

A. He was there with the bailiff.

Q. Where abouts?

A. There at the house.

Q. Did you see him all the time?

A. No sir, I went in the room to eat.

Q. You don't know where he was while you were in the room to eat?

A. He was out there with the bailiff.

294 Q. How do you know?

A. He was out there when we went out there.

Q. But you don't undertake to tell the court where they were while you were eating, do you?

A. They were there where we left them when we came back.

Q. Was there any intoxicants of any kind furnished the jury that you know of?

A. No sir.

Q. Was any of the jury drinking that you know of?

A. No sir.

Q. Was anything said in your deliberations about what the Easterling Lumber Company had offered for a compromise in this case?

A. No sir.
Q. Do you remember Mr. Lee saying anything about a compromise being offered, before you decided the case?
A. No sir.
Q. How old a man are you Mr. Kelly?
A. 58 my next birthday.
Q. You drink whiskey sometimes don't you?
A. No sir.
Q. You don't drink at all?
A. No sir.

Examination by Mr. DENT:

Q. The charge is made here that some of those jurors were drunk, tell the court whether or not that is true?
A. No sir, it is not.
Q. How long has it been since you took a drink, Mr. Kelly?
A. It will soon be eight years.
Q. You didn't even smell any liquor there?
A. No sir.
Q. Tell the court if anything happened while you were there that influenced them in any way unduly?
295 A. No sir.
Q. Tell the court if any men could have been kept closer than they were kept together during those three days?
A. I don't think there could have been.
Q. Mr. Lee was in charge of the bailiff all the time he was separated from the rest of you?
A. Yes sir.
Q. Nobody was talking to him?
A. No sir.
Q. Do you tell the court you obeyed his instructions the best you could?
A. I never saw a jury obey the instructions any better.
Q. The charge is made that whiskey was carried to them?
A. I don't know any thing of it if it was.

J. W. KEYS (white) being called as a witness by counsel for defendant, on oath testified as follows:

Examination by Mr. STUBBS:

Q. Your name is J. W. Keys?
A. Yes sir.
Q. You were a member of the jury that tried the case of S. W. Pierce vs. Easterling Lumber Company et al. at this term of the court?
A. Yes sir.
Q. Tell the court what separation the jury indulged in during the time they were empanneled, if any?
A. None at all, only the last night.
Q. What happened the last night?
A. I don't know just exactly what time Mr. Lee went out.

Q. J. H. Lee?

A. J. H. Lee went out the last night. We were all lying there trying to sleep, and I don't know what time he went out; and he went out, and he had been taking medicine he said, and had
296 been complaining of being sick all during the day, and he was going in the closet backwards and forwards and I don't know but what he was in the closet, and as well as I recollect, I don't know whether it was a half hour or an hour, and he came in again and Mr. Odom came in right after him.

Q. He was gone out you say, and you don't know whether it was—State what you said about the time he was out?

A. I don't recollect how long. But after I missed him it appeared to me like it might have been a half hour or three quarters or maybe an hour. I won't say exactly the time; and when he came in Mr. Odom came in a few minutes after he did.

Q. If he went to the closet it wasn't but just a step, was it?

A. He said he went to the closet out side of the door.

Q. There was a closet inside the do-mitory, wasn't there?

A. This fellow Scott was mighty sick, and he was occupying that a right smart, and the other one—the water had given out and he said he stepped into the other one.

Q. He was gone some length of time that you didn't know where he was?

A. No sir, I don't know where he was.

Q. How did he get his fiddle there to fiddle for you boys?

A. I don't think they had any fiddle there that night. Mr. Magee, the deputy went after that fiddle, and he brought both the fiddles the night before.

Q. Did you see any signs of intoxicants there of any kind?

A. Not a bit in the world.

Q. When Mr. Lee came back in there, did he say any thing about getting any whiskey down town?

A. No sir.

Q. Were you awake when he came back?

A. Yes sir, I don't think there was a bit of ontoxicants there at all I didn't smell it.

Q. Do you drink yourself?

297 A. No sir. I haven't drank a drop of whiskey in 25 years; I don't fool with it.

Q. Did you observe Mr. J. H. Lee at the time whether he was drinking or not?

A. I don't think he was; if he was, I couldn't tell it.

Q. Mr. Keys, was there any — said in your deliberations by J. H. Lee, or any other member of the jury in your presence, with reference to what the Easterling Lumber Company had offered as a compromise in this case before you rendered your verdict?

A. Mr. J. H. Lee said the company had offered $5,200.00 is the remarks I heard.

Q. That was before you made up your verdict?

A. We were going to make up a verdict and he spoke that.

Q. That was when you were in the room?

A. Yes sir. That is the remark he made as well as I remember.

Q. That is the same J. H. Lee that was out that night that length of time?

A. Yes sir, I don't recollect when he went out but I recollect when he came in.

Q. Do you remember of J. H. Lee being absence when you were taking your meals at Mr. Lowry's?

A. No sir, I don't recollect of him being absence there.

Q. Don't you remember one night at supper 11 of you went in and eat and Mr. Lee was absent?

A. I don't recollect of his being absent from the jury while we were at meals or any time, except that night.

Q. When he spoke that, Mr. Keys, with reference to the compromise of this $5,200.00, being offered by the Easterling Lumber Company, did he say that out so a part of the jury could hear it or tell you privately?

A. He just spoke it out, he said "They have offered a compromise of $5,200.00," is just what he said, he didn't say it privately.

298 Q. You didn't hear any evidence of that kind on the witness stand, did you?

A. No sir, none at all.

Examination by Mr. DENT:

Q. Mr. Keys had you made up your verdict at that time?

A. No sir, we just commenced to make it up.

Q. What he stated had nothing to do with you so far as your verdict was concerned?

A. No sir.

Q. No- with any of the other jurors?

A. I don't know what it had with them but it didn't have with me.

Q. There was no outside communication received at all by the jurors?

A. No sir.

Q. And you don't know where he got his information?

A. No sir.

Q. Or whether or not that was true?

A. No sir.

Q. They charge there was drunk-ness and whiskey was carried to you jurors; is that true or not?

A. There wasn't a drop of whiskey in the room as I know of.

Q. Did you ever see a crowd of more sober men than they were on that jury?

A. I never did in my life.

Q. Mr. Lee said his bowels were troubling him?

A. Yes sir, he had been taking pills, and he went out that night, and was gone a little time. I don't know just how long; and when he came in Mr. Odom came right in after him.

Q. Mr. Keys, the $5,200 wasn't mentioned until—You didn't discuss this case with any body until you went into the jury room to consider the verdict?

A. No sir.

299 Q. And Mr. Lee said nothing in the world what was said except what he stated in the jury room, and you don't know whether he made it jokingly or how, do you?

A. I think he meant it. He just spoke to the jury "They have offered $5,200 for a compromise"; and I didn't ask him anything about it.

Q. You say that had no effect on your judgment at all?

A. It didn't on me; not a bit.

Q. And it didn't on any of the others?

A. I couldn't say about that.

Q. That remark wasn't discussed at all? You didn't discuss it or the other members?

A. No sir.

Q. You had already fixed the liability before that, hadn't you?

A. Well, not just exactly. Of course we came together and all agreed on a certain amount, each man—and then we agree- together.

Q. You don't undertake to say that other jurors didn't make similar remarks of what they ought to pay—You didn't pay any special attention to all the remarks*m* but you were all going on in a general way, talking and laughing, and no import was given to that conversation at all?

A. No sir, not a bit.

A. E. LEE (white), being *a*clled as a witness by counsel for defendant, on oath testified as follows:

Direct examination (by Mr. STUBBS):

Q. Mr. Lee, are you one of the jurors that tried the case of S. W. Pierce against the Easterling Lumber Company at this term of court?

A. Yes sir.

Q. Tell the court what separation, if any, occurred among the jury during the time you were empanneled, from the time you were selected as a juror until you were discharged?

300 A. I don't know as there was any.

Q. Were the jury at all times where you could see them, to know where they were?

A. I don't know after I went to sleep what went on.

Q. Did J. H. Lee leave the room?

A. Not that I know of——

Q. At any time that you know of?

A. Not that I know of.

Q. Did he take supper with you on the first night or second night?

A. I don't know, I couldn't say.

Q. You don't know whether he was with you or not, do you?

A. I don't remember; I wasn't looking after him.

Q. You were a young man and you weren't paying much attention to what went on?

A. I allowed the bailiff was looking after him.

Q. You don't say as to whether or not they were all there, or not?
A. No sir.
Q. Do you know anything about any intoxicants of any kind furnished or used by the jury?
A. No sir.
Q. You were not drinking any, or any of the rest of them, that you know of?
A. No sir.
Q. In your deliberations of the case, Mr. Lee was there anything said about a compromise that the Easterling Lumber Company had offered a compromise to settle this case?
A. No sir.
Q. Did you hear any statement of that kind?
A. No sir.
Q. Do you know whether any such statement was made by J. H. Lee while you were in the room deliberating on this case?
301 A. No sir; if there was I didn't hear anything of it.
Q. Has anybody talked to you here about what you would testify in this case?
A. Nothing more than when I knew about it, and I told them I didn't know anything.

By Mr. R. L. DENT: Stand aside, Mr. Lee.

J. H. LEE (White), being called as a witness by the defendant and being duly sworn testified as follows:

Examination by Mr. STUBBS:

Q. Your name is J. H. Lee?
A. Yes sir.
Q. You were a member of the jury that tried the case of S. W. Pierce vs. Easterling Lumber Company?
A. Yes sir.
Q. Tell the court what separation occurred during the time that the jury was empanneled, if any?
A. I don't know that they were separated, Mr. Stubbs. Of course some of them were sick—I believe somebody—Scott Meaders was sick, and I was a little sick the first night, and I went in the closet two or three times, and I don't know how long I stayed in there, something got wrong with one of the closets on the inside of the do-mitory, and I went on the outside four or five feet, the door was open, and one of the deputies were there.
Q. When you took your meals did you take your meals with the others?
A. No sir, I forget whether it was at 12 or at supper, I went in behind the others, and they filled the table up and there wasn't any room.
302 Q. Where did you go from there?
A. Right back out on the porch.
Q. On what part of the porch?—Of the house with reference to where Will Magee lives?
A. I don't know where he lives.

By the COURT: How far was it from where the others were eating?
A. Some ten or twelve feet.
Q. Could you see them from where you were?
A. Oh, yes sir.
Q. Could they see you?
A. I reckon they could.
Q. Were you on the corner of the gallery furthest from the court-house?
A. Yes sir.
Q. Plumb around to the other side of the house, next to King's.
A. Like this is the sitting room, we went out there (indicating).
Q. And you were next to the bannister rail?
A. Yes sir.
Q. Who was with you?
A. Joe Odom.
Q. Did you go up or down while the people were eating?
A. No sir.
Q. You say you went out at the do-mitory?
A. Yes sir.
Q. How long did you stay out?
A. I suppose all the way from five to maybe twenty minutes; I don't know exactly. It is a good place to rest and I was a little sick.
Q. Did you stay out as much as an hour at any time?
A. No sir.
Q. Did you stay out as much as a half hour?
A. I might possibly, I don't hardly think so.
303 Q. Who was out there when you were out there?
A. Either Mr. Odom or John Magee.
Q. Did you say anything in the jury room when you were deliberating on this case about the Easterling Lumber Company having offered Sam Pierce $5,200 to compromise this case?
A. No sir.
Q. You didn't make any statement like that?
A. No sir.
Q. In the presence of old man J. W. Keys?
A. No sir.
Q. He was on the jury, wasn't he?
A. Yes sir.
Q. Did you make it to any other member of the jury?
A. No sir.
Q. You did the fiddling for the boys didn't you?
A. Part of the time;—yes sir.
Q. Do you tell the court, Mr. Lee, that all — time while you were empanneled as a juror that you knew where the other members of the jury were and they knew where you were?
A. Yes sir.
Q. During the entire time?
A. Yes sir.
Q. And you say at Mr. Lowry's you were not over ten feet from them?
A. Might have been a little further than that.

Q. There is about three rooms between the dining room and that gallery, isn't there?

A. I think there is just one yes, there is a little porch there and then the room, and then the outside porch where we were sitting.

Q. And the other 11 came out on the end of the gallery this way (indicating), and you still remained on the far end of the gallery?

304 A. No sir, I went in to supper then.

Examination by Mr. DENT:

Q. Mr. Lee, you talked about the compromise; you compromised up and down to get to arrive at a verdict in the room, didn't you?

A. Yes sir.

Q. A great many figures were mentioned?

A. Yes sir.

Q. Do you undertake to say just what figures were mentioned, whether it was $5,000 or $25,000 or anything of that kind; you couldn't tell, could you?

A. No sir.

Q. You talked different figures didn't you?

A. Yes sir.

Q. $5,200 or $17,500 or $7,500; you don't undertake to say those figures weren't mentioned?

A. No sir.

Q. Compromise was talked to get together, wasn't it?

A. Yes sir.

Q. You had no information, and didn't know that the Easterling Lumber Company had ever offered anything as a matter of fact, did you?

A. No sir.

Q. As a matter of fact, they never did offer $5,200?

A. I never heard of it.

Q. Tell the court whether or not there was any outside information or influence that was brought to you or come to you in any way whatever?

A. No sir, it wasn't mentioned in any way. The first one of us mentioned it was in that room there.

Q. You kept the instructions of the court, did you?

A. Yes sir, just as good as I possibly could, and all the balance.

305 Q. And you say a compromise was mentioned by you and all the balance?

A. Yes sir.

Q. And you stayed in there two or three hours in deliberating?

A. Yes sir.

Q. And you had been closed up three days?

A. Yes sir.

Q. And when you got in there you commenced talking about the different amounts?

A. Yes sir.

Q. Some wanted to give $5,000 and some $10,000 and some $25,000 and it varied?
A. Yes sir.
Q. And the compromise was talked about in different ways?
A. Yes sir.
Q. And you didn't keep any record of your remarks in there?
A. No sir.
Q. And you had no record or information as to what happened on the outside at all?
A. No sir, none whatever.
Q. You were in charge of the two bailiffs?
A. Yes sir.
Q. You never talked any outside matters at all?
A. No sir.
Q. Mr. Ban Lowry's name has been mentioned in this? He did make a remark at the hotel setting out another detail didn't he?
A. I think 14 had been eating there, and he made some remark about the jury or the case.
Q. And wasn't his attention called to the fact that some of the jurors were eating there now?
A. Yes sir, and he said "I beg your pardon. Excuse me."
Q. Can you tell the court what he said?
A. No sir, I never paid any attention to it at all, and I never answered him back in other words he wasn't talking to me.
306 Q. You say you were not separated from the jurors except where you could see them, and you were in charge of a bailiff all the time?
A. Yes sir.
Q. You tell the court on your oath you obeyed his instructions?
A. Yes sir.
Q. Now, Mr. Lee, the Easterling Lumber Company charges you gentlemen with drunk-ness; what about that?
A. I don't know anything about any whiskey at all.
Q. What about the other jurors?
A. I didn't see them drinking and I didn't see any whiskey.
Q. It is charged whiskey was carried to the jury; what about it?
A. I don't know anything about it.
Q. Were you drunk?
A. No sir.
Q. You were sick one night?
A. Yes sir.
Q. And you had to use the closet?
A. Yes sir.
Q. Nobody was in there with you, was there?
A. No sir.
Q. Where was the bailiff at the time?
A. He was standing around the door.
Q. There was nobody around the court-house then, was there, Mr. Lee?
A. No sir.
Q. Nobody at all?

A. No sir.

Q. You saw nobody while you were in the closet, except the jurors and the bailiffs?

A. There came up some fellows one night—I believe it was Mr. Warren.

Q. He is deputy sheriff, isn't he?

307 A. Yes sir.

Q. And has charge of the court-house?

A. Yes sir.

Q. You did have a fiddle?

A. Yes sir.

Q. The bailiff was sent after that?

A. Yes sir.

Q. You didn't go to town?

A. No sir.

Q. You were not separated, and had no communication with the outside world at all?

A. No sir.

By Mr. STUBBS:

Q. You say some fellows did come up there, and named William Warren any body else?

A. Yes sir; William Tew also came out on the front some 20 feet.

Q. Did you come up and talk with him?

A. No sir.

Q. Was that while you were in the closet?

A. No sir, I was in the do-mitory.

Q. Where were your bailiffs at that time?

A. They were with us.

Q. Did your bailiffs stay in the room just like a juror?

A. One did I think.

Q. And he stayed there among you just as a juryman?

A. Yes sir, some time one of them would step out the men would send for tobacco and other things.

Q. Mr. Tew was a lawyer and was with the deputy sheriff at the time?

A. Yes sir.

308 Q. Mr. Tew is prosecuting attorney and has been elected by the people here?

A. I couldn't tell you I don't know.

BEN S. LOWERY (white), being called as a witness by defendant, after being sworn, on oath testified as follows:

Examination by Mr. STUBBS:

Q. What is your name?

A. Ben S. Lowery.

Q. Have you been sworn in this case?

A. Yes sir.

Q. What official position have you held in this county, if any at any time?

A. You mean previous to this time?
Q. Yes?
A. I have been deputy sheriff here for 5 years.
Q. Do you remember the time at this term of court when the case of S. W. Pierce vs. Easterling Lumber Company was being tried?
A. Yes sir, I wasn't at court but I remember it.
Q. Were you at home?
A. Yes sir, some of the time.
Q. State Mr. Lowery, what you know, if anything, with reference to the jury being separated, or not, that you observed over at your home?
A. I don't think I saw any of the separated, except one evening or maybe at noon, they could have seen each other at noon time, but Mr. Lee and Mr. Odom, the bailiffs were at the dinner table when I came to dinner, and the others were on the porch, but there were doors between them and could have seen them.
Q. Mr. Odom and Mr. Lee were at the dinner table, but the other 11 were outside?
A. Yes sir, on the porch.
309 Q. Did you ever see them at any time that Mr. Lee was away from them?
A. That was at noon and that evening after the others had gone to supper I passed on the other gallery outside of the house, and Mr. Odom and Mr. Lee were sitting there, and I went to shave and they were — when I come back.
Q. The other jurors were eating supper and they were out on what gallery with reference to Walter Magee's house and the jail there?
A. Walter Magee's house is south of ours, and the jail is northeast; they were on the northeastern side of our house.
Q. How far were they from the dining room then?
A. I couldn't tell you I guess some 35 feet.
Q. Could the jury see each other at that time?
A. No sir.
Q. How long did they stay out there?
A. I don't know:——
Q. What were they doing?—Mr. Odom and Mr. Lee at that time, with reference to talking or not?
A. I really couldn't tell you about that. I passed out by them and was going after a shave, and it seems to me it was the evening of the 4th of July, and as I passed, I asked if I could get a shave, and Mr. Odom told me he couldn't get it, that he had tried; I think there were three or four others there on the porch, and none of the other people could eat at the table when the jury was eating, and I think Mr. Lee said he was sick and wasn't going to eat, and they were on the porch when I came out and were all talking.
Q. Do you mean the jury were all talking?
A. The jury and one bailiff was in there eating when I went to get a shave.
Q. At the time, Mr. Lowery, could all the jury take their meals together—was the table long enough for them?

310 A. They could at that time, but they were sick, I understand at the noon hour they could not.

Q. Did you see any signs of any whiskey, or drinking of any whiskey?

A. No sir, I wasn't with them.

Q. Did you go close to Mr. Lee after he returned there and did you smell his breath?

A. No sir, I wasn't close to Mr. Lee; the fact is I passed in behind them and went up to my room for a shave, and didn't say anything to them.

Q. Did you have a conversation with Mr. J. T. Huff, one of the jurors this morning with reference to their separation?

A. Mr. Huff and I spoke — that this morning on the road. He passed me and I don't remember just what was asked, but we were talking about it, and I said I had been summoned and I didn't have my watch, and I asked him about the time, and he said he knew nothing about the separation.—I believe he asked me what it was for, and I told him I guessed it was for talking to one of the jurymen at the table, and I asked him about his, and he said he was called because of being a juryman, and he says——

Q. What did he say with reference to any of the jurymen leaving the room?

Objection. Sustained. *Witness.* Exception.

Q. What did you say, if anything, to any juryman relative to this case?

A. The first meal they took there I came and didn't know there was any of them in there. Eleven jurymen and one bailiff had eat dinner and were on the gallery so I thought they were all out, and went on to the table, and just made a remark about

311 court, and asked what was doing at court, and they told me they were on the Pierce case, and I had that morning heard they were going to compromise or something——

By the COURT: Tell what you said.

A. I just asked them "I suppose that man is liable to get something out of it", and they didn't answer me, and I says "I don't know anything about it, but I — just saying what I heard."

Q. Who were you talking to:—John Odom and Lee?

Objection. Leading.

Q. Who were you talking to?

A. The two were there; I don't know who I was talking to; I think my father and one of my brothers.

Q. Was any member of the jury there?

A. Yes sir, there was a juror and Mr. Odom and my father and brother.

Q. And you didn't know this juryman was a juryman?

A. No sir, I thought the jury had gone out.

By the COURT: What was it you said to him about the compromise?

A. I didn't mention the compromise.

Examination by Mr. DENT:

Q. Why don't you tell the whole truth about this matter, and then your attention was called to the fact that there were jurors there and stopped the conversation? When you started to talk about it, and were told one of the jurors were there you quit didn't you?

A. My father called my attention to it after I had made a couple of statements.

Q. And you quit right then, didn't you?

A. Yes sir.

312 Q. And you said nothing either one way or the other as to who should recover?

A. No sir, except I just said, he was liable to get something out of it. I merely said that because I heard they were compromising it.

Q. And then somebody told you one of the jurors were there and you quit right then?

A. Yes sir.

Q. You are not certain as to who called you- attention to the fact that a juror was there?

A. Mr. Odom and Mr. Lee and my father were there, and I think my father called my attention to it. Mr. Lee was at the end Mr. Odom was next to him, and I was next down the side of the table.

Q. Now, Mr. Lowery, you never saw Mr. Lee there but what all the jurors were there at the house together, did you?

A. They were where they could see each other, except that evening when they were out on the porch and the others were at the table.

Q. I say they were all at your father's house?

A. Yes sir.

Q. In charge of both bailiffs, and you never saw Mr. Lee except when he was in charge of a bailiff?

A. No sir.

Q. You have been deputy sheriff yourself, haven't you?

A. Yes sir.

Q. You have seen jurors go off in charge of bailiffs, haven't you?

A. When we are ordered not to we do not separate.

Q. When they go out to relieve themselves, do you mean to say they separate and all go off?

A. They generally remained in sight of each other.

Q. That evening you don't know who else was with him besides Mr. Odom do you?

313 A. It was just him and Mr. Odom.

Q. Didn't you tell the court a while ago some of them were sick and didn't go in together?

A. That was him and Mr. Odom.

Q. You have been making inquiry about this matter, haven't you and talking it around?

A. I have when you lawyers talked to me about it.

Q. I asked you this morning didn't I?

A. Yes sir.

Q. And you were talked to by the other different people weren't you?

A. I was talked to by the other lawyers.

Q. Mr. Lowery, you can't say on your oath, that that jury wasn't kept aloof from—You don't know anything about it, except what you have testified to here, do you?
A. I guess not; no sir.

T. S. BURNHAM (White), being called as a witness by counsel for defendant, on oath testified as follows:

Examination by Mr. STUBBS:

Q. What is your name?
A. T. S. Burnham.
Q. You were one of the jurors that tried the case of S. W. Pierce against the Easterling Lumber Company at this term of court?
A. Yes sir.
Q. Tell the court what you know, if anything, with reference to the separation of the jury if they separated?
A. I don't know anything about them separating.
Q. Were they together all the time?
A. The best I know they were.
Q. Were the jury where you could see each and every one of them all the time?
314 A. Yes sir, as long as I was awake.
Q. They didn't separate as long as you could see them either at meals or any other time?
A. No sir. Well, yes sir, they did at dinner one time; the table was filled up until they didn't have room for all of us to eat at the same table.
Q. Was J. H. Lee one that was left out?
A. Yes sir.
Q. Do you know anything about his leaving the do-mitory here and going out and being gone any length of time?
A. No sir.
Q. Did you have any whiskey in the jury room?
A. No sir.
Q. Or any kind of intoxicants?
A. Not that I know of.
Q. In your deliberation when you *went* in your room to decide the case did — hear anything said by J. H. Lee or anybody else about a compromise being offered by the Easterling Lumber Company, offering the man so much money?
A. No sir.
Q. Did you hear anything said of that kind?
A. No sir, not a word.
Q. You were in there, were you?
A. Yes sir.

No examination by Mr. Dent.

M. R. BURNHAM (White), being called as a witness by Counsel for defendant, on oath testified as follows:

Examination by Mr. STUBBS:

Q. Are you one of the jurors that tried the case of S. W. Pierce vs. Easterling Lumber Company.

A. Yes sir.

315 Q. What separation if any, did the jury indulge in while they were empaneled?

A. None that I know of.

Q. Was J. H. Lee separated from you at any time?

A. If he did I didn't know it.

Q. Did he separate from you at meal time at Mr. Lowery's or anything like that?

A. No sir.

Q. Did he take his meals with you?

A. Yes sir.

Q. You know he did?

A. Yes sir.

Q. Do you know anything about whether he left the dormitory while you were asleep?

A. No sir, I don't know, when I was asleep.

Q. Well, when you were awake, did he leave?

A. No sir.

Q. He was the man that did the fiddling, wasn't he?

A. Yes sir.

Q. You don't know anything about his leaving at all?

A. No sir.

Q. Have you and Mr. Lee talked over this case this morning?

A. No sir.

Q. Was there any- said by Lee or any other member of the jury or any one else in your presence, with reference to what the Easterling Lumber Company offered in the way of a compromise in this case, before you rendered a verdict?

A. No sir.

Q. Do you say that wasn't said in the presence of the jury that he was offered any certain amount of money?

A. Not in my hearing, no sir.

316 Examination by Mr. DENT:

Q. Stand aside Mr. Burnham. There was no whiskey bought or drank there that you know of?

A. No sir.

Q. They were absolutely sober men and obeyed the instructions of the court as well as they could?

A. Yes sir.

D. R. McINNIS (White), being called as a witness by counsel for defendant, and being duly sworn testified as follows:

Examination by Mr. STUBBS:

Q. Your name is D. R. McInnis?
A. Yes sir.
Q. You are one of the jurors that tried the case of S. W. Pierce vs. Easterling Lumber Co. at this term of court?
A. Yes sir.
Q. State what you know about the jury remaining together all the time they were on the jury?
A. So far as I know they did.
Q. Did Mr. J. H. Lee stay with you all the time?
A. Yes sir.
Q. Do you tell the court he was on the jury all the time and you know where he was?
A. While I was awake, I slept part of the time.
Q. Did he take his meals with you all the time?
A. I think he did.
Q. Do you know whether he did or not?
A. I couldn't swear that he did; one meal he was sick and didn't eat supper.
Q. Do you know where he was while you were eating supper?
A. I don't believe I could swear.
317 Q. Did he leave the do-mitory one night before he laid down?
A. No sir.
Q. You don't know anything about his leaving the do-mitory?
A. No sir.
Q. Do you know anything about whether he was under the influence of liquor or not?
A. No sir, I don't think he was, if he did I didn't smell it.
Q. Was there any liquor used there with the jury that you know of?
A. No sir.
Q. Was there anything said by J. H. Lee while you were deliberating about the Easterling Lumber Co. having offered a compromise in this case?
A. No sir, not that I heard.
Q. Did you hear anything like that?
A. No sir.

Examination by Mr. DENT:

Q. There was no drunk-n-ess or disorder there at all, was there?
A. No sir.
Q. Have you ever seen 12 men give any better attention to a case *those* than those 12 men?
A. No sir.
Q. And you said those 12 men obeyed the orders of the court on the trial of this case?
A. Yes sir.

Q. No whiskey was carried to the jurry at all?
A. None to me. I didn't see any.
Q. And Mr. J. H. Lee was there with the other jurors just like the other jurors?
A. Yes sir.
Q. He was sick at one time?
A. Yes sir, and he taken some pills.
318 Q. And one of the other jurors was sick?
A. Yes sir.
Q. And he went out in charge of a deputy because the other closet was out of fix, and no one ever left there except in charge of a deputy, did they?
A. No sir.

J. A. CHANCE (White), Being called as a witness by counsel for defendant on oath testified as follows:

Examination by Mr. STUBBS:

Q. Were you present at the time the case of S. W. Pierce vs. the Easterling Lumber Company was being tried?
A. Yes sir.
Q. State to the court what demonstrations if any were made when one of the plaintiff's witnesses were on the stand, Mr. Zabe Ducksworth, by the people, or you, or any one else?
A. I never noticed about others, but I slapped the side of my leg a time or two.
Q. Several times?
A. A time or two.
Q. And did others do that close to you, too?
A. I never noticed about it; I heard some noise, but I can't say what others did?
Q. And that was when Zabe Ducksworth was testifying as a witness for the plaintiff?
A. Yes sir.
Q. Do you know whether that attracted the attention of the people or not?
A. I suppose the noise all together would attract attention.
Q. Was there anything said that would cause you to notice it or attract the attention of the court?
319 A. Yes sir I heard the court speak of it.
Q. What did the court do?
A. I think the court asked who it was slapping their hands.
Q. And ask them to desist from it and not to do it any more?
A. Yes sir.
Q. Where was the jury when that was said and done?
A. I think they were over there (indicating).
Q. It was all in the presence of the jury?
A. Yes sir.

Examination by Mr. DENT:

Q. Isn't it a fact Mr. Zabe Ducksworth and Mr. T. Brady Jr., were engaged in a little conversation, kind of spatting at each other, and

that Zabe said something, and Mr. Brady replied, and it just occurred in that way—isn't that all there was to it?

A. Yes sir, that is what——

Q. Is what Zabe Ducksworth said?

A. Yes sir.

Q. And he said something about a t-y t*y*-, and said he made the same observation as you did to Mr. Reimers?

A. Something like that?

Q. You were laughing at what Zabe Ducksworth said to Mr. Brad*dy*?

A. The whole thing tickled me and that*y* is a habit of mine, to slap my leg.

Q. And the court said to keep order and told the sheriff to keep order?

A. I remember the court asking who slapped their hands, and I didn't slap my hands at all.

Q. There was no demonstration made in the court room there for the plaintiff or defendant?

320 A. I wasn't slapping for either party.

Q. You were not concerned in the litigation, were you?

A. No sir.

JNO. MCDERMOTT (White) Being called as a witness by defendant, on oath testified as follows:

Examination by Mr. STUBBS:

Q. Your name is John McDermott?

A. Yes sir.

Q. What official position do you hold at this time, John?

A. I don't know sir, whether I have any official position or not?

Q. Well, what are your duties if any, around the court house?

A. To clean up the court house.

Q. Are you the janitor.

A. Yes sir.

Q. John, do you remember the time when the case of S. W. Pierce vs. Easterling Lumber Company was tried?

A. Yes sir, I have some recollection of it.

Q. Do you remember cleaning up the dormitory after that jury was discharged?

A. No sir—Oh, yes, after they were discharged.

Q. Did you find any signs or anything where liquor had been kept in there while the jury was in there?

A. No sir.

Q. Or empty bittles or anything like that?

A. No sir.

Q. Have you ever stated to anybody you found empty bottles in there?

A. No sir.

Q. That is all?

By Mr. STUBBS: We rest.

321 By the COURT: It was suggested to the court that both of the bailiffs and regular deputy sheriff are here, and if the

court was not satisfied with the testimony that he already had before him, that the counsel for Mr. Pierce were ready to introduce those witnesses, but the Court stated it was entirely satisfied, and did not care to hear those witnesses.

*Opinion of the Court.*

The court overrules the motion for a new trial, because the testimony fails to show that the jury separated, except such separation as all the testimony show- were necessary and unavoidable; And because the testimony fails to show that any of the jurors were drunk or in a drunken condition, or that any liquor or any intoxicants of any kind were furnished the jury from the time they were empaneled until the verdict was rendered into the court, and because the testimony fails to show that any of the jurors were corrupted or influenced by any outside influence whatever.

The court finds that nine of the jurors testified that they did not hear the juror J. H. Lee state to the jury during their deliberations that a compromise had been offered by the Easterling Lumber Company to the Plaintiff. One of the jurors—Jordan, testified, that the juror did state during their deliberations, that a compromise had been offered by the Easterling Lumber Co. to the plaintiff, but the juror said he stopped juror Lee, and that no amount was mentioned. Another juror,—J. W. Keys, stated that the juror Lee stated to the jury that a compromise of $5,200 had already been offered by the Easterling Lumber Company to the plaintiff, but the juror Jordan and the juror Keys both stated that these statements by juror Lee did not influence their verdict in any way whatever.

322 The court is of the opinion that the witness Lee did make the statement that the juror- Keys and Jordan testified to with reference to the compromise. The court finds that the other jurors simply gave negative testimony which shows they did not hear the statements that were made when they were made.

To which action of the court in overruling said motion the defendant did then and there except, and does still except.

323 No. 530.

S. W. PIERCE
vs.
EASTERLING LUMBER COMPANY et al.

*Testimony Taken on Supplemental Motion by Defendant for New Trial, Which Motion was Filed and Heard on July 19, 1912.*

J. C. MAGEE (White), was introduced by counsel for Plaintiff, and testified under oath as follows:

Examination by Mr. DENT:

Q. Your name is J. C. Magee?
A. Yes sir.

Q. How old are you Mr. Magee?
A. 39.
Q. Do you remember when the S. W. Pierce case came up, against the Easterling Lumber Co., et al.?
A. Yes sir.
Q. Were you one of the bailiffs for that jury?
A. I was.
Q. I want you to tell the court what opportunity, if any, the jury had for getting any kind of outside information, Mr. Magee?
A. It had none.
Q. Tell the court how you managed that jury—Tell the Court how that jury was handled. I believe it was about three days in progress, wasn't it?
A. Yes sir—We both stayed with them.
Q. Who was the other bailiff?
A. Mr. Odom. We both stayed with them as close as we
324 could and kept them right together, and when one of us wasn't there, the other was, and they had no chance whatever to get information as I could see when I was there.
Q. When they were out of the do-mitory, both bailiffs were *was* with them, wasn't they?
A. Yes sir, one was in front and one was behind them, generally.
Q. Did you hear during the trial of this case, that the defendants had offered any kind of settlement in the case?
A. No sir.
Q. Did you hear it discussed with the jury?
A. No sir, the jury never mentioned the case in any way whatever the whole time I was with them, and if they did, I never heard it.
Q. What did the jury know when they decided this case, if they didn't know anything about it when they were empaneled, except what they heard from the court and the witnesses in the case?
A. If they knowed any thing about it they were bound to have known it before they went into the box, because they didn't get it while they were in our charge.
Q. They were under your control and Mr. Odom's control all the time?
A. Yes sir.
Q. Will you take the court to the jury do-mitory and show him particularly, just how you kept the jury, and where the jury was kept?

By the COURT: I have gone and examined the do-mitory.

By Mr. R. L. DENT:

Q. When the jury was locked up at night, who kept the key?
A. Mr. Odom generally kept it.
Q. It was kept by one of the bailiffs?
A. Yes sir.
325 Q. And there was no possible way for one of the jurors to get out of the jury room at night while the others were asleep?
A. No sir.

Q. The do-mitory is in the second story of the court house?
A. Yes sir.
Q. There is no possible way for any body to get to the jury when you had the door locked?
A. They had to come up the *o*stair way and come to the door.
Q. And you stayed with them constantly?
A. Yes sir.
Q. Night and day?
A. Yes sir.
Q. Did they sleep in the jury room here (indicating)?
A. Yes sir.
Q. When they were using any closets adjacent to that room, state if they were on the outside of that room, and if the middle door was kept open and the outside door closed?
A. One closet got out of order one night in the jury room, and they had to use the one outside, but a bailiff stayed out there all the time with the men.
Q. Did any body have conversation or intercourse with any of the jurors while you and the other bailiff were with them?
A. No sir.
Q. You took an oath from the court to do your whole duty, didn't you?
A. Yes sir.
Q. Did you do it as the court directed?
A. Yes sir.

Examination by Mr. STUBBS:

Q. One of you went *g* behind and one ahead of that jury when you moved?
A. Yes sir.
326 Q. In passing through the *c*ourt room into the jury room, one would go ahead to open the door, and the other would follow, and the jury would all pass into the room?
A. How is that?
Q. In passing from the court room into the jury room, wouldn't one of the bailiffs go ahead and open the door, and other bailiff follow, and the jury follow after him?
A. I don't know as we opened that jury room but once.
Q. One of you would go into the jury room, wouldn't you?
A. We carried them in there. One of us went along with them. I don't know whether we were right ahea*r*d of them or in the front.
Q. You don't know whether you went ahead of them or behind?
A. One of us was right *n*ear the front.
Q. When you went into that jury room you had to go into a little hall-way before you reached the jury-room?
A. Yes sir.
Q. Will you tell th*at* court, when that jury was passing out the last time, when this case was submitted to them, that some one wasn't standing in that hall-way and said the company had offered $5,200 and the verdict ought not to be less than $15,000.?
A. I say they didn't.

Q. Why did you say they did not?

A. Because one of us would have heard it. We cleared that alley-way when we started them out, and cleared it out so there would be no trouble.

Q. Then you would walk beside each juryman?

A. No sir, I didn't say that.

Q. Do you say that wasn't said to some juryman as he passed out?

A. I say it was not.

Q. How do you know?

A. Because nobody was there.

Q. Did you look to see whether anybody was there?

A. Yes sir.

327 Q. Which way did you look?

A. I looked in the alley there; all you had to do was to walk there and look in it.

Q. And you state to the court such word- could not have been said as you passed out there and you not heard it?

A. Nobody was there to say it. There was no room in there for anybody to stay.

Q. Do you remember particularly the last time when they passed out?

A. I don't remember particular-, but we never allowed anybody to get in there when we went in there.

Q. You don't remember the last time they passed out, after the case was argued, how do you know that wasn't said?

A. Because there was nobody there to say it.

Q. Were you behind or in front?

A. I don't remember.

Q. If you were behind and not in front, couldn't somebody have said and you not saw it?

A The other bailiff wouldn't *haven't* have allowed it, and I will swear to the court there was nobody there?

Q. If you were walking behind 12 men and didn't get into the hall-way at all, and the other bailiff was ahead, you still will swear nobody was in that hall-way?

A. Yes sir.

Q. When you couldn't see the hall-way back here, in the court room?

A. Our o-d*res* were we were to clear them out before we went in there.

Q. You tell the court it wasn't done when you don't remember that particular occasion?

A. I know it wasn't done because nobody was in there.

328 J. E. Odom (White), being called as a witness by Counsel for Plaintiff, testified on oath, as follows:

Examination by Mr. E. L. Dent:

Q. Your name is J. E. Odom?

A. Yes sir.

Q. How old a man are you?

A. 48.

Q. What official position in this county have you held?

A. I have been a member of the Board of Supervisors.

Q. How long?

A. 8 years—Two terms.

Q. What office in that body did you hold?

A. President of the Board.

Q. How much experience have you had around the criminal courts, as bailiff, Mr. Odom?

A. I have served last January term of the Circuit Court, and during this term, from the first up until now, and years back I have served.

Q. You were binded deputy sheriff?

A. Yes sir.

Q. Do you remember when the case of S. W. Pierce vs. Easterling Lumber Co. et al. was tried at this term?

A. Yes sir.

Q. Were you one of the bailiffs of that jury?

A. Yes sir.

Q. How many did they have?

A. Two.

Q. Who was the other bailiff?

A. Mr. J. C. Magee.

Q. The gentleman who has just testified here?

A. Yes sir.

329 Q. Tell the court, Mr. Odom, what opportunity, if any, the jurors who tried that case had to get any outside information of any kind after they were empaneled, until they rendered their verdict about this case, except what they heard from the witnesses and from the court?

A. They had none at all that I know of.

Q. Tell the court what position—Were you in such a position to know?

A. Yes sir.

Q. Tell just how you and the other bailiff managed them?

A. Myself and Mr. J. C. Magee used precaution in trying to obey the orders of the court to keep any one from having communication with any of the jurors, and in going to and from the jury do-mitory it was the custom with us and agreement that one of us would be in the lead or near the lead, and the other behind or near the rear.

Q. You clear-d the aisle?

A. Yes sir, and looked especially to see that no one was in the closet near that little hall-way or alley-way.

Q. And you tried to keep any outsider from speaking to the jury in any way?

A. Yes sir.

Q. And you did that?

A. Yes sir.

Q. And Mr. Magee did that?

A. Yes sir.

Q. You state that was your object, in being bailiffs of the jury?

A. Yes sir.

Q. Was to keep them together?

A. Yes sir.

Q. Did you hear anything about any offer of compromise getting to the jury in any way, shape or form?

A. I did not.

330 Q. As one of the bailiffs, when did you first hear about this $5,200. offer of compromise, if there has ever been any made at all?

A. I never heard it at all—until—it was just here this morning I heard about the $5,200. compromise.

Q. And you tell the court as an officer of the court, that the jurors had no opportunity at all to find out while they were in your custody and charge, anything else except what the court and the witnesses said to them?

A. No sir, I don't know of any.

Q. And they were either in your charge or Mr. Magee's charge all the time?

A. Yes sir, when Mr. Magee was away I was present.

Q. Whenever the jurors went to go to their dinner or supper or to the closet, you and Mr. Magee were both present?

A. Yes sir.

Q. And when the jury was confined in the second story of the court-house—there is only one way to get into the do-mitory?

A. There is only one door passage.

Q. Who kept the key to that?

A. I kept it at nights.

Q. And all the time?

A. During the time we had charge of the jury in the do-mitory I kept it. I might have turned the key over to the janitor during the day to clean up the room, but when the jury was there I had the key at all times.

Q. When the jury was out of the do-mitory I understand you to tell the court you and Mr. Magee were both with them,—that is correct, isn't it?

A. Yes, sir, unless it happened an occasion like this: We would be down town, some of the jury would want something out of the stores, and one of the bailiffs would stay with the jury while the other went in the store and got what the jury asked us to get.

331 Q. And they would be huddled up in a *stop*, wouldn't they?

A. Yes sir.

Q. Away from the general public?

A. Yes sir.

Q. And nobody would be allowed to intermingle with the jury at all?

A. No sir.

Examination by Mr. R. L. DENT:

Q. Mr. Odom you have seen juries before*m* haven't you?
A. Yes sir.
Q. Have you ever seen a jury kept more closely confined, and could a jury have been kept more closely confined, and eat like they did, than by having their meals brought to their room?
A. I have never seen a jury kept closer, and I don't think anybody could have kept them closer than Mr. Magee and myself.
Q. When they would go to the toilet who would go with them?
A. One oor other of the bailiffs would go.
Q. How many steps would you have to make to get to the toilet in the night time, where they slept?
A. The nearest one was something like 4 or 5 steps.
Q. That is in conjunction with the room, isn't it?
A. Yes sir.
Q. And that is closed with an outside door, isn't it?
A. Yes sir.
Q. Is that door kept open or closed?
A. The door to the closet on the inside?
Q. The door to the entrance to the room?
A. Was it locked?
Q. Yes sir:—was it kept open or closed?
A. It was kept closed, ge*b*erally.
Q. Do you remember any of the jurors being sick?
A. Yes sir.
Q. Tell the court whether you went with them and stayed
332 with them when they would be sick, and had to use the closets?
A. Yes sir, I went with them.
Q. Do you say to this court the jury was kept as closely confined as it could be kept, and no outside communication was had with them?
A. Yes sir, I th-nk so, that is my best judgment.

Examination by Mr. STUBBS:

Q. Were you with them all the time, Mr. Odom?
A. No sir.
Q. You were not with the jury all the time?
A. No sir.
Q. What time was it that you were not with them?
A. There was several occasions I wasn't with them, but I would always leave Mr. Mag*g*e with them when I left.
Q. You spoke of going to the store, and when they wanted some little article you would bunch them up on the street and one of you would go in after it?
A. Yes sir.
Q. You didn't do that way when you went to the drug store, did you? Didn't all of you go into the drug store together?
A. We have been to the drug store on more than one occasion.
Q. You all went to the drug-store didn't you?

A. My reccollection is we did.

Q. And you all drank soda water, and Mr. Magee, one of the bailiffs, furnished it, and you gathered around the fountain?

A. I don't know that they all drank soda water.

Q. They all drank something there, didn't they?

A. Yes sir.

Q. And the store had other people in it there at that time?

A. I don't remember of seeing any one but the one that waited on *the* them, beside the jury and the bailiffs.

Q. When you went to travel from one place to another, one of you bailiffs would go ahead and the other behind, wouldn't you?

A. That was the general rule. As I first stated we would
333 be near the lead or near the rear.

Q. When you went to get the -u*yr* from the court room to the jury room—*O* don't mean the do-mitory—I mean the jury-room, how would you get them in there?

A. The same as I just mentioned.

Q. One of you would go ahead and the other behind?

A. Yes sir.

Q. And there would be the space of a row of twelve men between the bailiffs, wouldn't it?

A. About that, yes sir.

Q. In passing from the court-room to the jury-room, don't you have to enter a little hall before you can reach the jury-room?

A. Yes sir.

Q. And is that hall usually dark or light?

A. It is light.

Q. Cloudy days it is light?

A. Not as light on cloudy days as fair days.

Q. You can't see anybody in that hall, passing out of the court room, until you get in the hall, can you?

A. No sir, unless they are behi*b*d the door.

Q. If they are behind the door facing on either side, you can't see them until you get in the hall, can you?

A. No sir, or near the hall you can't see them.

Q. After the case had been argued and submitted, do you remember how the jury was gotten into that room, in regard to the bailiffs?

A. When you began to ask that question I was fixing to answer the other question, and I didn't understand the question.

Q. I say, after the case had been argued and submitted, the first time the jury went into the jury room after the close of the argument, do you remember how that jury was carried into the jury room, through that little hall with reference to the bailiffs?

A. I couldn't state positively just how.

Q. Do you remember whether you went ahead or behind that time?

A. I do not.

334 Q. And you don't remember how Mr. Magee went?

A. No sir, but as a general rule, in passing towards the jury do-mitory, I would make it a point to go ahead, because I had a key in my pocket.

Q. But in passing to the jury room?

A. I don't remember just which one was in the lead, or which behind.

Q. Will you tell the court that it was not said by some person, when the jury passed into the jury room, at that time, that the Easterling Lumber Company had offered $5,000 or $5,200, and the verdict ought not to be less than $15,000? Do you say that was not said so the jury could hear it, by somebody in the hall, or in the judge's stand?

A. I can say to the best of my knowledge and belief that it was not said.

Q. You do not say it was said?

A. I will say I don't think it was possible for it to have been said, because I noticed particular there was nobody in the hall.

Q. If you didn't go out ahead how do you know you noticed this particular time?

A. I don't know whether I went out ahead or not.

Q. At this particular time I have reference to, when they passed out into the jury room, when you said — don't know whether you went ahead or behind the jury?

A. I don't remember.

Q. Do you know whether that hall was clear at that time or not, or can you tell the court with any certainty or not?

A. I can tell the court when I examined that hall;—on every occasion I examined it, when the jury passed out, there was no one in the hall at any time when the jury was passing backwards and forwards that I saw.

Q. On this particular occasion, if you were behind the jury that could have been said and the man gone before you could have
335 seen him, if you were following the jury?

A. It could have been possible, yes sir.

Examination by Mr. R. L. DENT:

Q. You clear-d the aisles always, didn't you?

A. Yes sir, when I was in the lead.

Q You saw absolutely there was no communication at all?

A. Yes sir, and it was understood between me and Mr. Magee that if he happened to be in the lead he was to clear all the alley ways, and if I was ahead, I would do it; and that is — that part was managed, and understood between us.

Q. You say you kept the key and kept the jury locked up all the time?

A. Yes sir.

Q. And there was no chance for them to get out at any time?

A. No sir. When the jury would retire I would put the key in my pants pocket, and I remember distinctly one night I kept my pants on and the key was in my pocket.

Q. And the door was locked?

A. Yes sir.

By the COURT: The motion of defendant is overruled.

By Mr. STUBBS: The defendant excepts to the ruling of the court.

I, M. O. Thrapp, Official Stenographer for the Thirteenth Circuit Court District of the State of Mississippi, hereby certify that the above and foregoing Two Hundred and Eight- Five (285) pages are a true, accurate, correct, and complete transcript of My official stenographic notes, taken in the case of S. W. Pierce vs. Easterling Lumber Company, et al. No. 530, tried at the July term 1912, of the Circuit Court of Covington County, Mississippi, at Collins, Mississippi.

335½ And, further that I have this day delivered in person to Hon. Dan Williamson, Circuit Clerk of Covington County, at Collins, Miss., said transcript;

And further, that I have this day notified by U. S. Mail, postage prepaid, the following attorneys:

Messrs. Hirsch, Dent & Landau, Vicksburg, Miss.; Hon. E. L. Dent, Collins, Miss., of Counsel for Plaintiff.

Hon. T. Brady, Brookhaven, Miss.; Hon. J. T. Stubbs, Collins, Miss., of Counsel for Defendant.

they being all the attorneys of record in said cause, that said transcript has this day been delivered to said Circuit Clerk to be filed by him.

Given by me this 18th day of October, A. D. 1912.

M. O. THRAPP,
*Official Court Stenographer pro Tem.,*
*13th District of Mississippi.*

We, the undersigned attorneys for the defendant hereby certify that we have had the use of the foregoing stenographer's notes for the purpose of examination and correction and that we have found the said Stenographer's notes correct and that we have on this the 23rd day of October, 1912, personally delivered to E. L. Dent one of Plaintiff's attorneys the said notes.

Witness our signatures this 23rd day of October, 1912.

T. BRADY, JR.
J. J. STUBBS.
HERMAN DEAN.
BRADY & DEAN.

Examined and approved and returned to clerk this October 23rd, 1912.

E. L. DENT,
HIRSCH, DENT & LANDAU,
*Att'ys for Plaintiff.*

Received by me from E. L. Dent, Att'y for Plaintiff, this October 23rd, 1912.

DAN WILLIAMSON,
*Circuit Clerk.*

Stenographer's notes filed in my office this October 18th, 1912.

DAN WILLIAMSON, *Clerk.*

336 In the Circuit Court of Covington County, Mississippi.

No. 482.

SAM W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendant-.

This cause came on to be heard upon defendant'- *action* for a new trial and on defendant's supplemental motion for a new trial, and all evidence being heard, it is the judgment of the court that the said motion for a new trial and the said supplemental motion for a new trial should be overruled. The said motion for a new trial and said supplemental motion for a new trial are hereby overruled and defendant is denied a new trial in this case.

Done this the 19th day of July, A. D. 1912.

DAN WILIAMSON.

Filed 19th day of July, 1912. Dan Williamson, Clerk, by V. T. Deese, D. C.

337 In the Circuit Court of Covington County, Mississippi.

No. 482.

SAM W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendant-.

This cause came on to be heard upon defendant- action for a new trial and on defendant's supplemental motion for a new trial, and all evidence being heard it is the judgment of the court that the said motion for a new trial and the said supplemental motion for a new trial should be overruled. The said Motion for a new trial and said supplemental motion for a new trial are hereby overruled and the Defendant is denied a new trial in this case.

Done this the 19th day of July, A. D. 1912.

To which ruling of the court the*re* defendants *there* excepted.
E.

338 THE STATE OF MISSISSIPPI,
*Covington County:*

Know all men by these presents:

That we, Easterling Lumber Company, Principal, and W. D. Reimers, E. E. Burns, sureties, *and* held and firmly bound unto S. W. Pierce in the sum of thirty five thousand dollars and no cents, for the payment of which, well and truly to be made we bind our-

selves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this the — day of August, A. D. 1912.

The condition of the above obligation is such that whereas on the — day of July, 1912, a judgment was rendered by the Circuit Court of Covington County, State aforesaid, in favor of said S. W. Pierce for the sum of seventeen thousand, five hundred and 0/100 dollars and — cents, besides cost of suit; wherein the said Easterling Lumber Company has prayed for and obtained an*d* appeal, operating as a supersedeas, returnable to the next term of the Supreme Court of the State aforesaid.

Now, if the said Easterling Lumber Company shall prosecute his said appeal, with effect, and shall well and truly pay and satisfy the judgment, damage and cost in case said judgment shall be affirmed, and shall also perform the sentence, judgment or decree the Supreme Court shall award in the premises, then the above obligation to be void, otherwise to remain in full force and virtue.

EASTERLING LUMBER COMPANY, [SEAL.]
By T. BRADY, JR., *Att'y.*
W. D. REIMERS. [SEAL.]
E. E. BURNS. [SEAL.]

I hereby approve and file the above bond this — day of August, A. D. 1912.

DAN WILLIAMSON, *Clerk.*

339 SAM PIERCE
vs.
EASTERLING LUMBER COMPANY.

Now comes the defendant and files this a special bill of exceptions to the action of the court in refusing to allow it after the plaintiff rested and before it offered proof in the case to file a notice under it- general issue which notice was as follows, to-wit:

The plaintiff will take notice that the defendant will show by affirmative evidence and will *o*ffer affirmative evidence tendering to show under its plea of general issue that the injuries suffered by the plaintiff then and there occurred through and by the act of a fellow-servant, then and there engaged about the same work, and for w-ich the defendant is not responsible; but whose negligence if any, was one of the assumed risks taken by the said plaintiff at the time of his employment, and that the statutes of the State of Mississippi, Chapter 194, 1908, page 204 if applied to the injury in question violates the Fede-al Constitution in that it is contrary to the Fourteenth Amendment thereof, denying to the defendant the equal protection of the laws; depriving it of its liberty and property without due process of law, in that under the said Constitution of the United States the said State of Mississippi is wholly without the power to pass an act which appl-es to every employer of certain persons without regard to nature of the employment of such em-

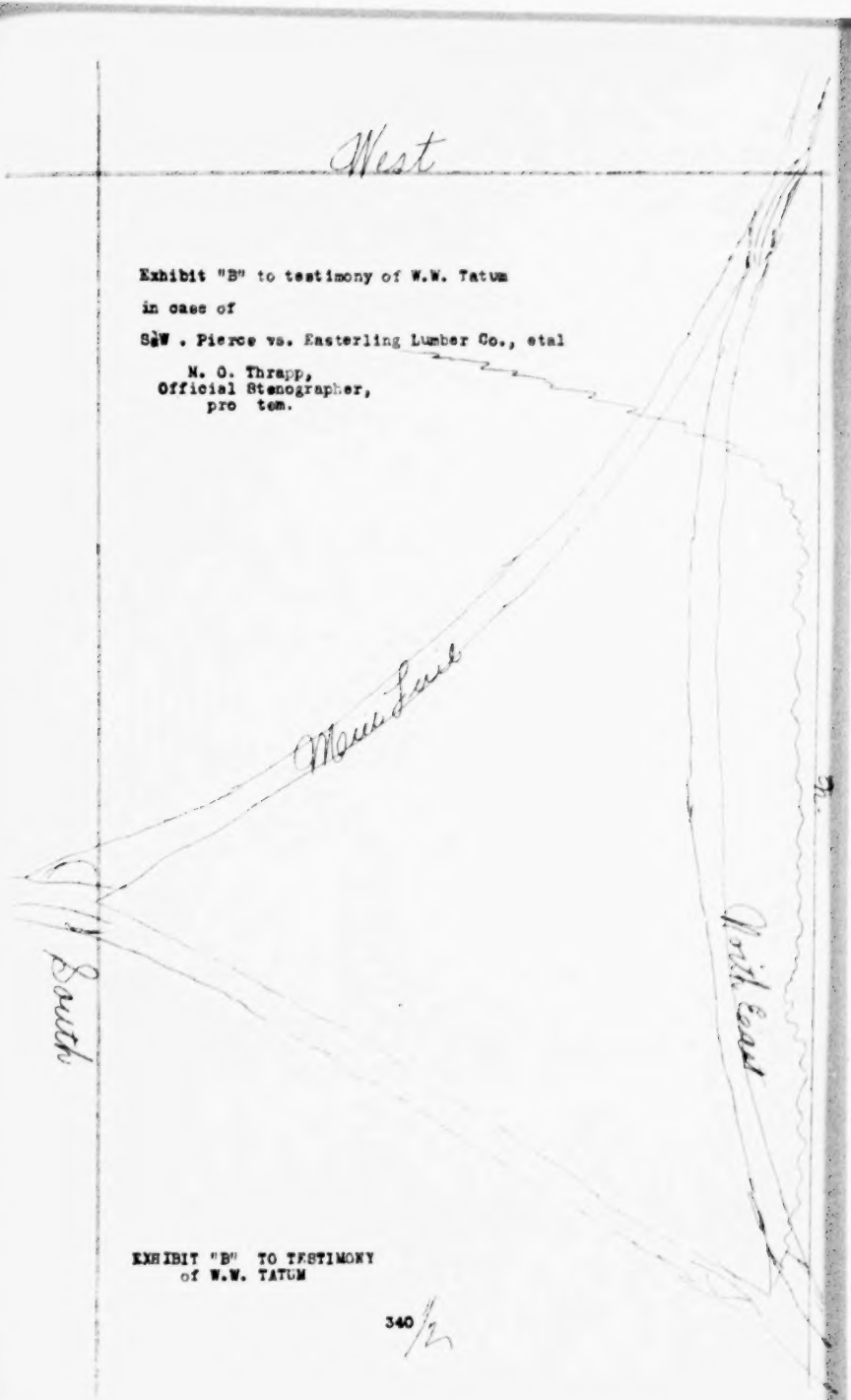


Exhibit "B" to testimony of W.W. Tatum

in case of

S&W . Pierce vs. Easterling Lumber Co., etal

M. O. Thrapp,
Official Stenographer,
pro tem.

EXHIBIT "B" TO TESTIMONY
of W.W. TATUM

340 1/2

ployee and in that an act so applied will violate said Federal Constitution and that said Statute cannot be severed judiciously as so to do would be judicial legislation and that to impose liabilities upon this defendant in this cause by reason of said action would be violative of the Federal Constitution.

And, furthermore, that said act is void because *of* violative of said constitution, because it deprives defendant of its liberty and property without due process of law, and deny to it the equal protection of the law. That the said Plaintiff then and there assumed the risk incident to the running of engine No. 6 and the
340 Shay engine; that the said defendant, the Esterling Lumber Company, was not guilty of any actionable negligence; that the said plaintiff was guilty of negligence of approximately causing and contributing to his said injuries in that he did not at the time of said injury and immediately prior thereto conduct as an ordinary prudent person would or should have done and then and there refused for his own safety, and wholly refused to stop said engine and thereby prevent and wholly fail to observe the rules of defendant not to enter upon said "Y" without protecting against said Shay engine, and without waiting for said Shay engine.

That both of the Easterling Lumber Company's co-defendants or fellow-servants of the plaintiff in this case, and all negligence on their part does not entitle the plaintiff to recover in this case since the plaintiff assumes the risk of all such negligence charged by him against the defendant.

EASTERLING LUMBER COMPANY,
By T. BRADY, JR., *Att'y.*

That the plaintiff objected to the filing of the notice above set forth but not on the grounds of surprise and the court sustained said objection and refused to allow said notice under the general issue to be filed or read to the jury, to which said action of the court the defendant, Easterling Lumber Company, then and there and during the trial of the case excepted and still excepts and hereby tenders this its special bill of exceptions to the action of the court in refusing the defendant the right to file and read its said plea and notice which special bill of exceptions is by the court hereby allowed and signed this July 5th, 1912.

W. H. HUGHES, *Judge.*

(Here follows diagram marked page 340½.)

341 STATE OF MISSISSIPPI,
*Covington County:*

Know all men by these presents:

That we Easterling Lumber Company, principal, and O. L. Benway and T. R. Thames, sureties *and* held and firmly — unto S. W. Pierce in the sum of Thirty Six Thousand Dollars for the payment of which well and — to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this the — day of October, 1912.

The condition of the above is such that whereas on the 5th day of July, 1912, a judgment was rendered by the Circuit Court of Covington County, State aforesaid, in favor of said S. W. Pierce for the sum of Seventeen Thousand Five Hundred Dollars beside cost of suit; wherein the said Easterling Lumber Company has prayed for an- obtained an appeal operating as a supersedeas returnable to the next term of the Supreme Court of the State aforesaid.

Now, if the said Easterling Lumber Company shall prosecute his said appeal, with effect and shall well and truly pay and satisfy the judgment, damages and costs of the case said judgment shall be affirmed, and shall also perform the sentence, judgment or decree the Supreme Court shall award in the premises, then the above obligation to be void, otherwise to remain in full force and virtue.

EASTERLING LUMBER COMPANY,
By T. BRADY, JR.
O. L. BENWAY AND
T. R. THAMES.

Appealed and filed this the 23rd day of October, 1912.
DAN WILLIAMSON, *Clerk*.

342 In the Circuit Court of Covington County, Mississippi.

No. —.

SAM W. PIERCE, Plaintiff,
vs.
EASTERLING LUMBER COMPANY et al., Defendants.

To Mr. M. O. Thrapp, Official Court Stenographer, Thirteenth Circuit Court District, State of Mississippi:

This is notice to you in writing, as required by chapter 111 of the Laws of 1910, that a copy of the Stenographer's notes in the case of Sam W. Pierce vs. Easterling Lumber Company et al., is desired for the purpose of appealing the case. You are requested and desired to furnish a copy of said notes as required by Chapter 111 of the Laws of 1910.

EASTERLING LUMBER COMPANY,
By T. BRADY, JR., AND
J. J. STUBBS, *Attorneys*

To Dan Williamson, Circuit Clerk:

We, T. Brady, Jr., and J. J. Stubbs, attorneys representing the Easterling Lumber Company in the case of Sam W. Pierce vs. Easterling Lumber Company et al., hereby certify that the above and foregoing is a copy of the notice served upon M. O. Thrapp, official court stenographer, by handing to the said M. O. Thrapp personally, upon this date, and within thirty days from the adjournment of court, said notice of which the above is a copy.

Witness our signatures, this the 22 day of July, A. D. 1912.

T. BRADY.
J. J. STUBBS.

Filed within thirty days from the adjournment of the July, 1912, term of Circuit Court of Covington County, this 24th day of July, 1912.

DAN WILLIAMSON,
*Circuit Clerk.*

Filed 24th day of July, 1912.
DAN WILLIAMSON, *Clerk.*

343 *Appeal Bond.*

STATE OF MISSISSIPPI,
*Covington County:*

Know all men by these presents:

That we Easterling Lumber Company, principal, and O. L. Benway and T. R. Thames, sureties *and* held and firmly bound unto S. W. Pierce in the sum of Thirty Six Thousand Dollars, for the payment of which, well and truly to be made, we bind ourselves our h*ei*rs, exc*e*utors, administrators and assigns, jointly and severally, f*o*rmly by these presents, sealed with our seals this the 23rd day of October, 1912.

The condition of the above obligation is such that whereas on the 5th day of July, 1912, a judgment was rendered by the Circuit Court of Covington County, State aforesaid in favor of S. W. Pierce for the sum of Seventeen Thousand Five Hundred Dollars beside costs of suit; wherein the said Easterling Lumber Company has prayed and obtained an appeal, operating as a supersedeas returnable to the next term of the Supreme Court of the State aforesaid:

Now if the said Easterling Lumber Company, shall prosecute his said appeal with *a*ffect and shall well and truly pay and satisfy the judgment damages and costs in case said judgment shall be affirmed and shall also perform the sentence judgment or decree the Supreme Court shall award in the premises, then the above obligation to be void otherwise to remain in full force and virtue.

EASTERLING LUMBER COMLANY,
By T. BRADY, JR., *Att'y.*
O. L. BENWAY.
T. R. THAMES.
DAN WILLIAMSON, *Clerk.*

Appealed and filed this 23rd day of October, 1912.

344 STATE OF MISSISSIPPI,
*Covington County:*

I, Dan Williamson, Clerk of the Circuit Court of Covington County, Mississippi, hereby certify that the foregoing 341 pages contain a true and correct literal copy of the evidence and record in the case of S. W. Pierce vs. The Easterling Lumber Company et al. as the same appears on file in my office.

Witness my official signature, this the 26th day of October, A. D. 1912.

DAN WILLIAMSON,
*Circuit Clerk.*

Transcript of Record:

| | |
|---|---|
| 102,000 at 10¢ per 100 | $102.00 |
| Binding fee | $1.30 |
| Express | $1.10 |
| Total | $104.40 |

345 We hereby accept service of the process herein contained and enter our appearance in the Supreme Court of the State of Mississippi for all practical purposes.

This 30th day of October 1912.

E. L. DENT,
HIRSCH, DENT & LANDAU,
*Att'ys of Record for S. W. Pierce, Appellee.*

346 STATE OF MISSISSIPPI,
*County of Hinds:*

In the Supreme Court, October Term, 1912; Second District.

16274.

EASTERLING LUMBER COMPANY, Appellant,
vs.
S. W. PIERCE, Appellee.

*Assignment of Errors.*

Comes the appellant herein and for error assigns as follows—towit: The Court below erred—

1. In refusing to sustain the objection interposed by the defendants to the questions propounded to plaintiff's witnesses on direct examination, as shown by the stenographer's notes.

2. The Court erred in sustaining the plaintiff's objections to questions propounded to plaintiff's witnesses by defendants on cross examination, as shown by stenographer's notes.

3. The Court erred in sustaining plaintiff's objection to questions propounded to defendants' witnesses on direct examination as shown by the stenographer's notes.

4. The Court erred in refusing to sustain the objections of de-

fendants to questions propounded to defendants' witnesses on cross examination, as shown by the stenographer's notes.

5. The Court erred in granting to plaintiff instructions marked given, numbered 1, 2, 3, and 4.

6. The Court erred in refusing and marking refused the instructions asked by the defendants, numbered as follows 1, 2, 3, 4, 5, 6, 7 and 8.

7. The Court erred in refusing to allow the defendants to amend their plea filed after plaintiff had rested and before defendants introduced any evidence.

8. The Court erred in refusing to grant the defendants the peremptory instruction which they sought, as shown by the stenographer's notes.

9. The Court erred in refusing to sustain the defendants' motion to exclude the evidence sought to be excluded, as shown by the stenographer's notes.

10. The Court erred in admitting the testimony tending to show and showing the negligence on the part of John Tatom,
347 Claud Warren and Will Tatom, because they were fellow servants of the plaintiff, since Chapter 194, Acts of 1908 page 204, is unconstitutional and void for the reasons fully set out in the stenographer's notes, and for the reasons fully set out in the defendants' special bill of exceptions.

11. The Court erred in refusing to allow the defendant, Easterling Lumber Company, to amend its plea by giving additional and amended notice under the general issue after the plaintiff rested but before defendants offered evidence, the nature of which additional and amended plea and notice under the general issue, is fully set forth in defendant, Easterling Lumber Company's special bill of exceptions filed and allowed by the Court.

12. The Court erred in granting to the plaintiff an instruction under Chapter 315, of Laws of 1912, whereby the burden of proof was, by said instruction, placed upon the defendant, Easterling Lumber Company, the jury being instructed thereby that the injuries sustained by plaintiff *was* prima facie evidence of want of reasonable skill and care on the part of defendant, Easterling Lumber Company.

13. The verdict was contrary to the law and the evidence.

14. The verdict was excessive.

15. The Court erred in overruling the motion for a new trial.

16. The Court erred in overruling the supplemental motion for a new trial.

And other errors to be assigned on the hearing.

Respectfully submitted,

MAYES & MAYES,
*Attorneys for Appellants.*

We have this day, January 1st 1913, mailed copy of the foregoing assignment of errors, postage prepaid, to Messrs. Hirsh, Dent & Landau Attorneys for Appellee, Vicksburg, Miss.

MAYES & MAYES,
*Attorneys for Appellants.*

Filed, January 2nd 1913. Geo. C. Myers, Clerk.

348 *Judgment.*

Supreme Court of Mississippi, March Term, A. D. 1914.

16274.

EASTERLING LUMBER COMPANY
vs.
S. W. PIERCE.

MONDAY, March 2nd, 1914.

This cause having been submitted at a former term of this Court on the record herein from the Circuit Court of Covington County, and the Court having sufficiently examined and considered the same, and being of opinion that there is no error therein, doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the July term A. D. 1912, on the 5th day of July 1912, be and the same is hereby affirmed, and that appellee do have and recover of appellants and O. L. Burney and T. R. Thames sureties *in* the supersedeas bond the sum of seventeen thousand five hundred dollars, the amount of the judgment in the Court below, together with the further sum of eight hundred and seventy five dollars being damages at the rate of five per centum as allowed by law, as well as interest on the amount of said judgment from date of rendition till paid at the rate of six per centum per annum, and also the costs of this cause in this Court and in the Court below to be taxed &c.

349 *Opinion.*

EASTERLING LUMBER COMPANY
vs.
S. W. PIERCE.

REED, *J.:*

Appellee obtained judgment against appellant in the sum of $17,500 for damages from personal injury. At the time he was injured, he was employed by the appellant company as an engineer in charge of an engine which was engaged in pulling a train carrying emplo-es of appellant company from its mill at Ora to its camp in the woods over its logging railway, a distance of about fifteen miles. The injury resulted from a head-on collision between the engine which was in charge of appellee and an engine known as the "Shay" pulling cars from the camp. Appellee charged, that the collision was from negligence of several employes of appellant company. This negligence included the placing of an incompetent engineer in charge of the "Shay" and the failure to give proper orders as to the proper running of the trains, which resulted in their unexpected meeting. Appellee's injury was serious and resulted in the loss of a leg.

Appellant assigns as error the refusal by the court to give instructions to the effect, that if the jury believed from the evidence in the case that the injury to appellee was caused by the negligence of a fellow servant — could not recover. Counsel for appellant in their brief make this assignment of error in the following words: "The court erred in denying the appellant the defense that the injury of appellee was caused by the negligence of a fellow servant."

This brings to our consideration the Law of Mississippi abolishing the fellow servant rule among certain employes.

It is asserted by appellant that Chapter 194 of the Acts of 1908 is unconstitutional for two reasons: (1) "It violates Section
350 193 of the Mississippi Constitution: (2) It violates the equality clause of the Fourteenth Amendment to the Constitution of the United States."

The title to Chapter 194 of the Acts of 1908 shows it to be an act to amend section 4056 of the Code of 1906, so as to abolish the fellow servant rule in actions for injuries to employes of railroads and other corporations using engines, etc., propelled by the dangerous agencies of steam, electricity, etc.

We quote the first section of the Chapter: "Every employe of a railroad corporation, and all other corporations and individuals, using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power and running on tracks, shall have the same rights and remedies for an injury suffered by him from the act or omission of such railroad corporation or others, of their employes, as are allowed by law to the person not employed.

"Knowledge by any employe injured of the defective or unsafe character or condition of any machinery, ways or appliances, or of the improper loading of cars, shall not be a defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. When death ensues from an injury to an employe, an action may be brought in the name of the widow of such employe for the death of the husband, or by the husband for the death of his wife, or by parent for the death of a child, or in the name of a child for the death of an only parent, for such damage as may be suffered by them respectively by reason of such death, the damages to be for the use of such widow, husband, parent or child, except that in case the widow should have children, the damages shall be distributed as personal property of the husband. The legal or personal representatives of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons.
351 In every such action the jury may give such damages as shall be fair and just, with reference to the injury resulting from such death to the person suing. Any contract or agreement expressed or implied, made by an employe to waive the benefit of this section shall be null and void; and this section shall not deprive an employe of a person, natural or artificial, or the legal or the personal representatives of such person, of any right or remedy they now have by law."

Section 193 of the Mississippi Constitution reads: "Every employe of any Railroad Corporation shall have the same right and remedies for any injury suffered by him from the act or omission of said corporation or its employes, as are allowed by law to other persons not employes where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employe injured, of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them. Where death ensues from any injury to employes, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by any employe to waive the benefit of this section shall be null and void; and this section shall — be construed to deprive any employe of a corporation or his legal or personal representative, of any right or remedy that he now has by the law of the land. The legislature may extend the remedies herein provided for to any other class of employes."

352 Section 193 of the Constitution of 1890 has been upheld as not violative of the Constitution of the United States.

It has been held that section 193 applies only to railroad corporations engaged in the business of common carrier- or those denominated "commercial railroad companies", and that it does not apply to railroads owned and operated as an adjunct to the main business of their owners, such as construction company roads, roads used in connection with mines and lumber corporations and logging roads. Construction Co. v. Heflin, 88 Miss. 314.

The railroad in the case at bar is a logging road.

It will be noticed that the final sentence of Section 193 provides for the extension of the remedies therein in the following language: "The legislature may extend the remedies herein provided for to any other class of employes." It is not argued by counsel for appellant that the legislature could not extend the remedies to employes of logging roads. It is conceded that this may be done. It is claimed that the words were at once a grant and a limitation that by necessary inference the limitation amounted to a denial to the legislature of a power to grant any remedies curtailing the fellow-servant rule other than those provided in the section.

It is true that by the statute, Chapter 194 of the Acts of 1908, there is a broader and fuller statement of the abrogation of the fellow-servant rule than that contained in the section of the Constitution. The maker- of the constitution, by section 193, provided for the abrogation of the fellow-servant doctrine to a certain extent.

It was said by Chief Justice Whitfield in the case of Ballard vs.

Oil Company, 81 Miss., 507, that it was the purpose of the
353 framers of the Constitution to authorize legislation to abolish the fellow-servant rule in the case of railroad corporations whose business was known to *the* inherently dangerous in so far as such litigati*in* would be in accord with the principles announced by the decisions of the United States Supreme Court. He further stated in his opinion in that case that: "the purpose of the last clause of Secti*in* 193 was to extend the remedies therein provided for to any other class of employes of corporations or persons whose business was, like that of railroads, inherently dangerous, or whose business was so different from the business of other corporations or persons as to fu-nish the basis for a classification of the busi*s*ness of such corporations, or persons, under which their employes might be permitted to use without reference to the fellow-servant law, while the employes of corporations or persons not having that sort of business could not so sue; in other words, to permit a classification based on 'some differen*t*- bearing a reasonable and just relation to the act in respect to which the classification is proposed. * * * It is not, therefore, to be supposed that the last clause of the section meant any more than that there might be other classifications of the employes of corporations or individual persons based also on some distinguishing difference in the nature of the business".

After making the provisions referred to and treating the subject in hand, the Constitution framers added at the end, and from its appearance, as an afterthought, the final sent*a*nce, "the legislature may extend the remedies herein provided for to any other class of employes." It will — noticed that the legislature is not enjoined to extend such remedies. The statement carries with it the thought that it was made as a suggesti*in* to the legislature to enact laws for the purpose of abolishing the fellow-servant rule in — other class of employes.

We cannot believe from an entire consideration of the sec-
354 tion, and in view of its evident purpose, that the final sentence was intended as a restriction. In truth, we do not see that it is necessary to regard it as a grant in order that the legislature should be enable- to enact a statute to abolish the fellow-servant rule in proper classes of employes. The legislature is entrusted with the general authority to make laws at discretion, unless there is a clear constitutional prohibition. Judge Cooley, in his Constitutional Limitati*in*s, p. 87, says: "In the enactment of laws the legislature must act upon its own reasons; mixed motives of power, justice, and pol*o*cy influence its action; and it is always justifiable and laud*i*ble to lean against a violation of the Constitution."

In the case of Hart vs. State, 87 Miss., 171, it is stated by Judge Truly, in delivering the opinion of the court, that: "It is the universally accepted rule of statutory construction that no act of the legislature will be condemned as violative of or repugnant to the fundamental law unless it manifestly be in palpable conflict with some plain provision of the state or federal contitution; as such conflict is not to be implied, it is the duty of the court, whenever possi-

ble, to give every expression of legislative will such construction as will enable the statute to have effect."

In Burnham v. Sumner, 50 Miss., 517, Chief Justice Peyton, said: "Whenever an act of the Legislature can be so construed and applied as to avoid conflict with the constitution and give it the force of law, such construction will be adopted by the courts. An inquiry into the validity of an act on the ground that it is unconstitutional, is an inquiry whether the will of the representa-ive as expressed in the law, is or is not in conflict with the will of the people as expressed in the constitution. And unless it be clear that the legislature has transcended its authority, the courts will not interfere."

"Acts of the legislature constitutionally organized are presumed to be constitutional and it is only where they manifestly in-
355 fringe some of the provisions of the constitution or violate the rights of the citizen, that their operation and effect can be impeded by the judicial power."

In Railroad v. Crawford, 99 Miss., 697, it was held that: "All doubts are resolved in favor of the constitutionality of the statute; if there is any reasonable doubt of its constitutionality it must be upheld by the court."

It is well settled in this state that it is the duty of the court to construe acts of the legislature so as to uphold their constitutionality and validity, if such can be reasonably done, and any doubts relative will be resolved in favor of the law. All presumptions are in favor of the constitutionality of *of* the act because the legislature, before passing the law, is required to consider the same and before acting upon it, determine as to its constitutionality.

However, we note that the statute abolishing the fellow-servant doctrine as to railroads and other proper classes of employes, have been held by the Supreme Court of the United States as constitutional. Tullis v. Lake Erie W. R. Co., 175 U. S., 348, 44 Law ed. 192; Minn. Iron Co. v. Kline, 199 U. S., 593, 50 Law ed., 322.

So the Legislature of Mississippi, without any provision in the State Constitution, such as section 193, could have enacted a law abrogating the fellow-servant rule in a class composed of railroad employes and such other proper classes. Section 193 is, in itself, only the enactment of a law on the subject of the fellow-servant doctrine. We do not see in it any purpose to prohibit the legislature from enacting statutes on the same subject. Such laws are reasonable in their effect. When applied to proper classifications they have been repeatedly uph*l*ed by the courts.

We conclude that there is no limitation in the Constitution of Mississippi on the power of the legislature to enact laws abol-
356 ishing the fellow-servant rule in proper classes. The final sentence in section 193 of the Constitution is not a limitation which denied to the legislature the power to pass the act, chapter 194 of the laws of 1908.

Now as to the contention that Chapter 194 violates the equality clause of the Fourteenth Amendment of the Constitution of the United States; Counsel for appellant contend that this violation is

accomplished by the inclusion of the words, "and running on tracks." We cannot agree with counsel that this is so.

It has been held that section 193 of the Constitution excludes all railroads except commercial railroads, or those engaged in the business of common carrier. We see in the act of the legislature the purpose to extend the remedy provided by the abrogation of the fellow-servant doctrine to all employes of all railroad corporations including the commercial railroads, and including also all other railroads, such as logging railroads and those connected with lumber and other enterprises using such engines, locomotives and cars, "running on tracks."

We understand the words "running on tracks" to define such engines, locomotives and cars propelled by the several dangerous agencies named as are used in all of the different kinds of railways. The statute was meant in its broad expression to exclude no kind of railway in Mississippi. The statute provides that the remedies extend to all employes using such engines, locomotives, or cars owned and operated by railroad corporations and all other corporations and individuals. In short, the class made by the statute is all employes using engines, locomotives, and cars of all kinds and descriptions propelled by the dangerous agencies specified and running on tracks, that is, on a defined way such as used by railroads. We deem this a reasonable classification which applies equally to all in the same situation.

357&358 In the case of Aluminum Company vs. Ramsey, 222 U. S. Rep. 251, 56 Law ed., 185, the constitutionality of a statute in Arkansas abolishes the fellow-servant rule as to corporations operating railroads in the state was upheld. The court, speaking through Justice McKenna, said: "The statute constitutes a class of corporations operating railroads, and under the cases we have cited the classification is valid, there being equality within the class." We find the Arkansas statute as broad in its terms as the Mississippi statute now under consideration. This statute abolishes the doctrine of common employment as regards railroad companies, all corporations of every kind, and every company, whether incorporated or not, engaged in the mining of coal.

The Supreme Court of Florida, in passing upon an act in that State which provides that the facts that the injured person is an employe of a railroad company and damages were caused by negligence of another employe, shall be no bar to recovery, and in upholding the statute as constitutional against the objection of inequality, decided that "it is within the province of the legislature to modify the common-law rules regulating employes' liability, and a wide discretion is accorded it in determining the subjects as well as the character and extent of regulations designed to promote the general welfare; the limitations imposed by the Federal Constitution being designed merely to prevent arbitrary uses of state authority. Taylor v. Prairie Pebble Phosphate Co., (1911) 61 Fla., 455, 54 So., 904."

Chief Justice White, in delivering the opinion of the court, in the case of Railroad Company v. Melton, 218 U. S., 34, 54 Law ed., 921,

said: "That the 14th Amendment was not intended to and does not strip the states of the power to exhert their lawful police authority is settled, and requires no reference to authorities. And
359&360 it is equally settled—as we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse the exertion of such authority, therefore the clause is not offended against simply because, as the result of the exercise of the power to classify, some inequality may be occasioned. That is to say, as the power is not taken away by the operation of the equal protection of the law clause, a wide scope of legislative descretion may be exerted in *cals*sifying without conflicting with the constitutional prohibition.

"It is beyond doubt for-closed that the Indiana statute does not offend against the equal protection clause of the 14th Amendment, because it subjects railroad employes to a different rule as to the doctrine of fellow servant from that which prevails as to other employments in the state," citing Tullis v. Lake Erie W. R. Co., 175 U. S. 348, 44 L. ed., 192, 20 Sup. Ct. Rep. 136; Pittsburg, C. C. & St. L. R. Co. v. Ross, 212 U. S., 560, 33 L. ed. 652, 29 Sup. Ct. Rep., 688.

Where there are reasonable reasons for doing so certain industries or classes of persons may be selected out for special regulation or for the enjoyment of special privileges. Willoughby on the Constitution, Section 484.

The beneficient provisions of the Fourteenth Amendment can hardly secure for all persons in this Nation the same remedies and the benefits of the same laws. It is enough if such are secured for all those in a class reasonably and properly made.

Peculiar duties, services and risks rest upon the employes of the corporations and individuals named in the statute. Their wants and conditions, in the employment, are alike. They — properly classified.

We fully appreciate the force of the argument made by the
361 counsel for appellant that employes at work upon traction engines or motor cars not running on tracks should be included. It may be that in the future when we have new, solid, stable highways throughout the rural districts, and when the streets in the towns are well paved, that traction engines and motor cars shall be so generall- used as to justify the formation of a class to receive the benefits from the abrogation by the legislature of the fellow-servant rule. At present and under the conditions now existing, we cannot see that the prospect of the advisability at some time in the future for such classification can in any manner interfere to declare unreasonable and unequal the formation of the present class for the benefits of such provisions.

It is clear to us that Chapter 194 of the Acts of 1908 make a reasonable and sufficient classification and is not repugnant to the equality clause of the Fourteenth Amendment.

It is further assigned as error that, "the court erred in instructing the jury, that if the appellee was injured by running an engine or

locomotive, the burden of proof was upon appellant to prove by a preponderance of the credible evidence that is negligence did not cause the injury to appellee."

This calls in question the operation of the provisions of Chapter 215 of the Laws of 1912, that in all actions against railroad corporations, etc., the proof of injury inflicted by the running of engines, locomotives, or cars shall be prima facie evidence of the want of reasonable skill and care, etc. Appellee was injured on October 16, 1911, before the prima facie statute, Chapter 215, was enacted. Appellant contends that because the law was passed after the injury, it should not apply in the trial of the case. The law was in effect at the time the case was tried in July, 1912.

We understand statutes like Chapter 215 provide a rule of evidence. Touching the question of the retrospective construc-
362 tions of statutes under the subject of "Statutes Relating to Remedy and Procedure," we find in 36 Cyc., p. 1213, the following statement of the law, "The presumption against the retrospective construction of statute is founded on the principle that they should not be given such a construction as will make them unconstitutional or unjust, and therefore as a general rule does not apply to statutes that relate merely to remedies and modes of procedure." In 36 Cyc., p. 1217 is the following: "Rules of evidence are at all times subject to modification by the legislature, and statutes making such changes as are applicable from their passage not only to causes of action arising thereafter, but also to actions accrued or pending at the time." It was decided in Carothers v. Hurley, 41 Miss., 71, that "The legislature has the power to change the rules of evidence, and to adopt new rules, so as to effect past and future rights of action."

In Belcher v. Mahoon, 47 Miss., 613, it was decided that "it is competent for the legislature to enact laws in respect to testimony, and to shift the burden of proof by pronouncing that, if certain facts exist, the presumption be that certain other things connected with them were done."

The statute in the case at bar dealt only with the rule of evidence and not with a substantive right. The court did not err in granting the instruction.

We note and have carefully considered the argument by counsel for appellant, that the court erred in refusing to vacate and set aside the judgment rendered against appellant because the jury had received information that appellant's attorney had offered appellee's attorney a certain sum in settlement of the case, and we quote the testimony taken upon the motion for new trial. A jury should be kept free from all outside influence and the trial judge should use
due care to see that this — accomplished. In this case, how-
363 ever, we cannot see that the judge erred in refusing to grant a new trial under the facts presented to him. He stated in overruling the motion for a new trial that the testimony failed "to show that any of the jurors are corrupted or influenced by any outside influence whatever." It is not shown that any corrupt means were used in conveying such information to the jury.

We cannot say that the verdict in this case is excessive. At the time he was injured, appellee was twenty-nine *reays* old in strong health and earning seventy-five dollars per month. His foot and ankle were crushed and bones in his leg were broken. He suffered great pain and was under treatment for about five months before his leg was amputated. He is permanently injured. It was the province of the jury to determine the amount of his damages for his suffering and permanent disability. While the verdict may seem large, still we cannot see on the facts as presented in this case, that it is not warranted.

We do not find any reversable error in this case.

Affirmed.

364 STATE OF MISSISSIPPI,
*County of Hinds:*

In the Supreme Court to the March Term, 1914.

EASTERLING LUMBER COMPANY et als., Plaintiffs in Error,
v.
S. W. PIERCE, Defendant in Error.

The Easterling Lumber Company and O. L. Benway and T. R. Thames, plaintiffs in error in the above styled cause, feeling themselves aggrieved at the judgment rendered on the second day of March, 1914, in favor of S. W. Pierce, defendant in error, come now by Edward Mayes, their attorney, and petition this Court for an order allowing the plaintiff in error to prosecute a writ of error to the Honorable, the Supreme Court of the United States of America, under and according to the laws of the United States of America in that behalf made and provided; and, also, that an order be made, fixing the amount of security which shall be given upon the writ of error, and that upon the giving of such security, all further proceedings in this case be suspended and delayed upon the determination of the writ of error by the Supreme Court of the United States of America.

And your Petitioner will ever pray.

T. BRADY, JR., AND
EDWARD MAYES,
*Attorneys for Plaintiff in Error.*

STATE OF MISSISSIPPI,
*County of Hinds:*

In the Supreme Court to the March Term, 1914.

EASTERLING LUMBER COMPANY et als., Plaintiffs in Error,
v.
S. W. PIERCE, Defendant in Error.

At a stated term, to wit, the March Term, 1914, of the Supreme Court of the State of Mississippi.

Present, the Honorable Sydney Smith, Chief Justice, and the Honorable Samuel C. Cook and Richard F. Reed, Associate Justices.

Upon Motion of Edward Mayes, Attorney for the Easterling Lumber Company, and for O. L. Benway and T. R. Thames, upon filing the Petition for Writ of Error and Assignment of Errors, *the* — order- that a Writ of Error be and is hereby allowed to them for review in the Supreme Court of the United States *in* the judg-
365 ment heretofore rendered; and that the amount of bond on the said Writ of Error shall be fixed at Forty Thousand and Five Hundred Dollars ($40,500.00); which, when approved, the said Writ of Error shall operate as a supersedeas.

SYDNEY SMITH,
*Chief Justice.*

[Endorsed:] Easterling Lumber Co. v. S. W. Pierce. Copy of petition for writ of error & fiat. Filed July 14, '14. Geo. C. Myers, Clerk.

366 STATE OF MISSISSIPPI,
*County of Hinds:*

In the Supreme Court to the March Term, 1914.

Know All Men By These Presents; That we, The Easterling Lumber Company and O. L. Benway and T. R. Thames, as principals, and Brookhaven Bank & Trust Co., Z. D. Davis and W. D. Davis, as sureties, are held and firmly bound unto S. W. Pierce in the full and just sum of $40,500.00 to be paid to the said S. W. Pierce, his heirs, executors, administrators or assigns, for which payment well and truly to be made, we do bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Witness our signatures, this the 14th day of July, A. D. 1914.

Whereas, lately, at a session of the Supreme Court of the State of Mississippi, in a suit pending in said Supreme Court between the said S. W. Pierce, as appellee, and the said Easterling Lumber Company as appellants, a final judgment was rendered by the said Supreme Court of the State of Mississippi on the second day of March,

1914, against the said Easterling Lumber Company, appellant, and its sureties, the said O. L. Benway and T. R. Thames, and the said Easterling Lumber Company and said sureties, Benway and Thames, and obtained from said Supreme Court a Writ of Error to the Supreme Court of the United States to reverse the judgment aforesaid, in said suit, and a Citation directed to the said S. W. Pierce is about to be issued citing and admonishing him to be and appear before the Supreme Court of the United States, to be held at Washington, in the District of Columbia: Now the condition of the foregoing obligation is such that if the said Easterling Lumber Company and O. L. Benway and T. R. Thames, shall prosecute their Writ of Error to effect, and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

EASTERLING LUMBER COMPANY,
By EDWARD MAYES,
*Attorney of Record.*
T. R. THAMES.
O. L. BENWAY.
BROOKHAVEN BANK & TRUST COMPANY, *Surety,*
[SEAL.] By Z. D. DAVIS, *President.*
367 By W. D. DAVIS, *Cashier.*
Z. D. DAVIS.
W. D. DAVIS.

Approved July 15, 1914.
GEO. C. MYERS, *Clerk.*

We do hereby agree that the foregoing bond is sufficient and may be approved by the Clerk of the Supreme Court of Mississippi, and we waive issuance and service of Citation, the same to be taken as if done on this date, July 14th, 1914.

E. L. DENT &
HIRSH, DENT & LANDAU,
*Att'ys for Appellee.*
MAYES & MAYES,
*Att'ys for Appellants.*

STATE OF MISSISSIPPI,
*County of Lincoln:*

Personally came and appeared before the undersigned Notary Public, W. D. Davis, Cashier of the Brookhaven Bank & Trust Company, who, being duly sworn, says upon oath that he signed the foregoing and attached bond; that he is worth over and above all liabilities the sum of Five Thousand Dollars, and that the Brookhaven Bank & Trust Company signed the foregoing and attached bond, being authorized so to do under its Charter, and that the said Brookhaven Bank & Trust Company is solvent and has assets over

and above all liabilities in the sum of One Hundred Thousand Dollars.

W. D. DAVIS.

Sworn to and subscribed before me, this the 13th day of July, A. D. 1914.

[SEAL.] J. H. BAILEY,
*Notary Public.*

STATE OF MISSISSIPPI,
*County of Hinds:*

Personally came and appeared before the undersigned Notary Public, Z. D. Davis, who being first duly sworn, sayd upon oath that he signed the foregoing and attached bond; that he is worth above all liabilities the sum of $50,000.00.

Z. D. DAVIS.

Sworn to and subscribed before me this the 14th day of July, A. D. 1914.

[SEAL.] AMOS R. JOHNSTON,
*Notary Public.*

368 In the Supreme Court of the United States of America.

EASTERLING LUMBER COMPANY et als., Plaintiffs in Error,
v.
S. W. PIERCE, Defendant in Error.

*Assignment of Errors.*

Come the plaintiffs in error, by their attorneys, and file the following assignment of errors upon which they and each of them will rely upon their prosecution of the writ of error in the above entitled cause from a judgment entered by the Supreme Court of the State of Mississippi on the second day of March, 1914, in said above entitled cause.

The Supreme Court of the State of Mississippi erred in rendering the judgment and opinion rendered by them in this cause on the second day of March, 1914, whereby said Supreme Court affirmed the judgment theretofore rendered by the Circuit Court of Covington County, in the State of Mississippi, against the plaintiff in error, the Easterling Lumber Company;

First. Because the judgment of the trial Court and the judgment of the said Supreme Court affirming the same, are in violation of the 14th Amendment to the Constitution of the United States, in that they deny to plaintiffs in error the equal protection of the law.

Secondly. Because the judgment of the trial Court and the judgment of the said Supreme Court affirming the same are in violation of the 14th Amendment to the Constitution of the United States in that they deny to plaintiffs in error the equal protection of the
369 law, in this: That they give effect to, and enforce as against plaintiffs in error, Chapter 194 of the Mississippi Session

Laws of the year 1908, which statute is void because repugnant to the equality clause of the 14th Amendment, aforesaid.

Third. Because the judgment of the trial court and the judgment of the said Supreme Court affirming the same are in violation of the 14th Amendment to the Constitution of the United States, in that they denied to plaintiffs in error the equal protection of the law and also deprived them of their property without due process of law, in this: That they give effect to, and enforce as against plaintiffs in error, Chapter 215 of the Mississippi Session Laws of 1912, which statute was enacted subsequently to the injury sued on.

Wherefore, the said Easterling Lumber Company, plaintiff in error, and the other plaintiffs in error who are the sureties on the appeal bond of said Easterling Lumber Company, in the appeal to the said Supreme Court of Mississippi, and against whom, as well as against the Easterling Lumber Company, the said judgment of the Supreme Court of Mississippi ran, because of their said suretyship, pray judgment of the Supreme Court of the United States of America that the judgment in the Supreme Court of Mississippi, aforesaid, be reversed; and that the cause be remanded to that Court, with proper instructions.

EDWARD MAYES AND
T. BRADY, JR.,
*Attorneys for Plaintiffs in Error.*

[Endorsed:] Easterling Lumber Co. et als., Pl'ffs in Error, vs. S. W. Pierce, Def't in Error. Assignments of Error. Filed July 14, 1914. Geo. C. Myers, Clerk.

370 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in said suit, between S. W. Pierce, as plaintiff, and the Easterling Lumber Company, as defendant, and wherein judgment was rendered in favor of said plaintiff in said Court on the second day of March, 1914, against the said defendants, and against O. L. Benway and T. R. Thames, sureties, and in which suit was drawn in question the validity of certain statutes of the State of Mississippi, on the ground of their being repugnant to the Constitution of the United States, and the amendments thereto, and the decision of said Supreme Court was in favor of the validity thereof, and in which suit was also drawn in question the validity of an authority exercised by the said Supreme Court, and by the Circuit Court of Lincoln County, in said State, under the statutes and Constitution of said State, on the ground that the same is repugnant to the Constitution of the United States and the amendments thereto, and the decision of said Supreme Court was in favor of the validity of such authority, and in which suit the said Easterling Lumber Company and its sureties

371 claimed a right, under the Constitution and the amendments thereto, and the statutes of the United States, and the decision of said Supreme Court was against such right, specially set up and claimed under such Constitution, the amendments and statutes, a manifest error hath happened, to the great damage of the said Easterling Lumber Company, O. L. Benway and T. R. Thames, as by their complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you do send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the fourteenth day of August next, in the said Supreme Court, to be then and there held, that the record of proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the said Supreme Court, the fourteenth day of July, 1914.

Witness, also, my signature, and the seal of the District Court of the United States in and for the Southern District of Mississippi, at Jackson, this the day and year aforesaid.

[Seal U. S. District Court, Southern District of Mississippi.]

L. B. MOSELEY, *Clerk.*

372 STATE OF MISSISSIPPI,
*Hinds County:*

I, Geo. C. Myers, Clerk of the Supreme Court of Mississippi, being the highest Court of law or equity of said State in which a decision can be had in any suit, do hereby certify that the foregoing 357 pages contain a true and correct copy of the record in said Court in the case of Easterling Lumber Company vs. S. W. Pierce No. 16274 on the docket of said Court together with the judgment of said Court, the opinion of said Court, Petition for writ of error and fiat of Chief Justice granting same, appeal bond to United States Supreme Court, Waiver of Citation by appellee, Assignment of errors in United States Supreme Court and Writ of Error, as the same appear of record on file in said Court.

Witness my hand with the seal of said Court affixed, at office in the City of Jackson, Miss., this the 16th day of July, A. D. 1914.

[Seal State of Mississippi, Supreme Court.]

GEO. C. MYERS,
*Clerk Supreme Court of Miss.*

Endorsed on cover: File No. 24,333. Mississippi Supreme Court. Term No. 589. Easterling Lumber Company, O. L. Benway and T. R. Thames, plaintiffs in error, vs. S. W. Pierce. Filed August 7, 1914. File No. 24,333.

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 589.

THE EASTERLING LUMBER COMPANY, O. L. BENWAY AND T. R. THAMES,
*Plaintiffs in Error.*

*versus*

S. W. PIERCE,
*Defendant in Error.*

In Error to the Supreme Court of the State of Mississippi.

## MOTIONS TO DISMISS OR AFFIRM, BRIEF AND TRANSCRIPT OF RECORD.

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Attorney for Defendant in Error
for the purposes of this motio

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E. D. DENT,
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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

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No. 589.

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EASTERLING LUMBER COMPANY, et al.,
*Plaintiffs in Error.*

*vs.*

S. W. PIERCE,
*Defendant et al.*

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Comes now the defendant in error, S. W. Pierce, and moves the Court to dismiss the writ of error in this case to the judgment of the Supreme Court of the State of Mississippi, for the want of jurisdiction, because the Federal questions presented are wholly formal, are so absolutely devoid of merit as to be frivolous, and have been so explicitly foreclosed by the decisions of this court as to leave no room for real controversy; or, if the writ of error shall not be dismissed, that the said judgment of the Supreme Court of the State of Mississippi be affirmed, on the ground that although in the opinion of this court the record may show that this court has jurisdiction, it is manifest that the said writ of error was taken for delay only, and that the questions on which the decision of the cause depend are so frivolous as not to need further argument. (Rule 6, Subdivision 5.)

J. HIRSH,
Counsel for the purpose of these motions.

HIRSH, DENT & LANDAU,
E. L. DENT,
Of Counsel.

## NOTICE OF MOTIONS.

To the above named Plaintiffs in Error, and to E. Mayes, of Jackson, Mississippi, and T. Brady, Jr., of Brookhaven, Mississippi, Attorneys of Record for Plaintiffs in Error in the above entitled cause:

You, and each of you, are hereby notified that the Defendant in Error in the above named cause, will, on Monday the 19th day of October, A. D., 1914, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the said court, the foregoing motions, and each of them, and the brief thereon including portions of the record hereto attached, and served upon you herewith.

J. HIRSH,
Vicksburg, Mississippi,
Attorney for Defendant in Error
for the purpose of these motions.

HIRSH, DENT & LANDAU,
E. L. DENT,
Of Counsel.

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## STATEMENT OF THE CASE.

This a personal injury case, the result of a collision by two trains.

The Easterling Lumber Company, Plaintiff in Error, is a large lumber manufacturing plant, and owns and operates a railroad for lumber and logging purposes, in connection therewith. The Defendant in Error, S. W. Pierce, plaintiff in the Circuit Court, at the time he was injured, was employed by the Easterling Lumber Company, one of the Plaintiffs in Error, as an engineer in charge of one of its engines, which was engaged in pulling a train carrying employes of the defendant from its mill to its camp, over its logging railroad, a distance of twelve or fifteen miles. The injury to the plaintiff resulted from a head-on collision between the engine, which was in charge of the plaintiff, and an engine known as the Shay engine, pulling cars from the camp. The plaintiff charged that the collision resulted from the negligence of two employes of said company, who were made defendants in the court below in this suit. The neg-

ligence charged, and proven, against the said defendant company was, that the placing of an incompetent engineer in charge of the Shay engine, and the failure of the superintendent, or the foreman of the railroad line to give proper orders for the proper running of trains, caused this unexpected meeting, and a collision, in which the plaintiff was severely and permanently injured, having lost a leg and received other injuries. Plaintiff obtained judgment in the Circuit Court of Covington County, Mississippi, for $17,500.00, and this judgment on appeal to the Supreme Court of Mississippi was affirmed.

The appellant in the Circuit Court, and in the Supreme Court of Mississippi assigned for error, the fact that "the court erred in denying the appellant the defense that the injury of the appellee was caused by the negligence of a fellow-servant," and that "the statutes of the State of Mississippi, Chapter 194, Acts 1908, page 204, and Chapter 215 of the Laws of 1912, violate the Fourteenth Amendment to the Constitution of the United States, for they deny to the defendant the equal protection of the laws and deprive it of its liberty and property without due process of law."

The Supreme Court of Mississippi held that said Acts did not contravene the said Fourteenth Amendment of the Constitution and were valid and obligatory.

In this Court, it is assigned for error:

That the judgment of the trial court and the judgment of the said Supreme Court affirming the same are in violation of the Fourteenth Amendment to the Constitution of the United States, for they deny to Plaintiffs in Error the equal protection of the law.

That the judgment of the trial court, and the judgment of the said Supreme Court affirming the same are in violation of the Fourteenth Amendment to the Constitution of the United States; for they deny to Plaintiffs in Error the equal protection of the law in that they they give effect to, and enforce as against the Plainiffs in Error, Chapter 194 of the Mississippi Session Laws of the year 1908, which statute is void because repugnant to the equality clause of the Fourteenth Amendment, aforesaid.

That the judgment of the trial court and the judgment of the said Supreme Court affirming the same, are in violation of the Fourteenth Amendment to the Constitution of the United States, in that they deny to Plaintiff in Error the equal protection of law, and also deprive them of their property without due process of law, in this, that they give effect to, and enforce as against Plaintiffs in Error, Chapter 215 of the Mississippi Session Law, 1912, which statute was enacted *subsequently to* the injury sued on.

## STATEMENT AS TO THOSE PORTIONS OF THE RECORDS PRINTED AND APPENDED HERETO.

For the purposes of this motion, the Defendant in Error, pursuant to the rules and practice, has caused to be printed and attached to this Brief, "portions of the record embodying all of the material and pertinent parts of the transcript, which relate to the motions filed herein," omitting those parts of the transcript which are not essential to the proper consideration of the motions.

Carey vs. Houston & T. C. R. Co., 150 U. S. 179.

Walston vs. Nevin, 128 U. S. 578.

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## I.

## MOTION TO DISMISS.

This motion is grounded upon the fact, which we respectfully submit, is patent, that the alleged Federal questions are frivolous, and have been explicity foreclosed by the decisions of this court.

Mr. Taylor in his work on Jurisdiction and Procedure in the United States Supreme Court, says: (p. 638.)

> "A writ of error from the Federal Supreme Court to the State Court, will be dismissed where the Federal question relied upon to confer such jurisdiction manifestly lacks all color of merit," and cites a number of cases to sustain the text.

This court said, in Equitable Life Assurance Society vs. Brown, 187 U. S. 308-311:

> "But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real, substantive question on which the case may be made to turn,' that is, 'a real and not a merely formal Federal question is essential to the jurisdiction of this court. Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for controversy, the motion to

dismiss will prevail. New Orleans Waterworks Co. vs. Louisiana, 185 U. S. 336, 345, and authorities there cited."

New York & N. E. Railroad Co., vs. Bristol, 151 U. S. 556.
Southern R. Co. vs. Carson, 194 U. S. 136.
Louisville & Nashville Railroad Company vs. Melton, 218 U. S. 36.

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## II.

## CONSTRUCTION OF STATUTE BY STATE COURT.

It is, of course, elementary law, that the validity of these statutes, under the State Constitution, cannot be considered in this court.

"If a State statute has been construed by the highest State Court it is the duty of this court to determine its constitutionality under the Federal Constitution as so construed."

Chicago, Ind. & L. Ry. vs. Hackett, 228 U. S. 559.

"The question of validity of a State statute under the State Constitution is foreclosed in this court by the decision of the highest court of the State."

City of Chicago vs. Sturges, 222 U. S. 313.

"An interpretation by the State Court, of a State Statute is controlling on this Court."

Clement National Bank vs. Vermont, 231 U. S. 120.

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## III.

## CHAPTER 215, ACTS 1912 VALID.

It is contended, without any real effort to cite any authorities that Chapter 215, Acts 1912, is unconstitutional if applied to injuries occurring before its passage.

The Defendant in Error was injured on October 16th, 1911, and the Act was approved March 6th, 1912.

A copy of the Act appears on Record pages 49 and 50.

It is to be noted that statutes of this character, although they

did not at first relate to passengers and employes, have been in force in the State of Mississippi ever since 1880, Section 1059, Code 1880. Section 1808, Code 1892. Section 1985, Code of 1906, and the latter Act was made to apply to passengers and employes.

The Supreme Court of Mississippi in affirming this case said: (R. page 59.)

> "[4.] It is further assigned as error 'that the court erred in instructing the jury that if the appellee was injured by running an engine, or locomotive, the burden of proof was upon appellant to prove, by a preponderance of credible evidence, that its negligence did not cause the injury to appellee.
>
> This calls in question the operation of the provisions of Chapter 215 of the laws of 1912, that in all actions against railroad corporations, etc., the proof of injury inflicted by the running of engines, locomotives, or cars, shall be prima facie evidence of the want of reasonable skill and care, etc. Appellee was injured on October 16, 1911, before the prima facie statute (Chapter 215) was enacted. Appellant contends that because the law was passed after the injury, it should not apply in the trial of the case. The law was in effect at the time the case was tried in July 1912.
>
> We understand statutes like Chapter 215 provide a rule of evidence. Touching the question of the retrospective construction of statutes under the subject of Statutes Relating to Remedy and Procedure, we find in 36 Cyc., p. 1213, the following statement of the law:
>
> 'The presumption against the retrospective construction of statute is founded on the principle that they should not be given such a construction as will make them unconstitutional or unjust, and, therefore, as a general rule, does not apply to statutes that relate merely to remedies and modes of procedure.'
>
> In 36 Cyc., p. 1217, is the following:
>
> 'Rules of evidence are at all times subject to modification by the Legislature, and statutes, making such changes are applicable from their passage, not only to causes of action arising thereafter, but also to actions accrued or pending at the time.'
>
> It was decided in Carothers vs. Hurley, 41 Miss. 71, that:
>
> 'The Legislature has the power to change the rules of evidence, and to adopt new rules, so as to affect past and future rights of action.'

In Belcher vs. Mhoon, 47 Miss. 613, it was decided that:

> 'It is competent for the Legislature to enact laws in respect to testimony, and to shift the burden of proof by pronouncing that if certain facts exist, the presumption shall be that certain other things connected with them were done.
>
> The statute in the case at bar dealt only with the rule of evidence, and not with a substantive right. The court did not err in granting the instruction."

This court has in language so plain that it is impossible to misconstrue it, maintained the validity of such statutes, and particularly Section 1985 of the Mississippi Code of 1906:

> "Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and State, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. A few of the leading ones are:
>
> Adams vs. New York, 192 U. S. 585.
> People vs. Cannon, 139 N. Y. 32.
> Horne vs. Memphis, etc., Ry., 1 Coldwell (Tenn.) 72.
> Meadowcroft vs. The People, 163 Illinois 56.
> Commonwealth vs. Williams, 6 Gray 1.
> State vs. Thomas, 144 Alabama 77.
>
> "We are not impressed with the argument that the Supreme Court of Mississippi, in construing the Act, has declared that the effect of the statute is to create a presumption of liability, giving to it, thereby, an effect in excess of a mere temporary inference of fact. The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury upon all of the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the prima facie case is enough as matter of law.
>
> The statute does not, therefore, deny the equal protection of the law or otherwise fail in due process of law, because it creates a presumption of liability, since its opera-

> tion is only to supply an inference of liability in the absence of other evidence contradicting such inference."
>
> Mobile, J. & K. C. R. R. vs. Turnipseed, 219 U. S. 35-42-43.

It is to be noted the Supreme Court of Mississippi in the present case adopted the view that this statute only created a rule of evidence, and gave no support to the views claimed to have been presented ,or maintained by the Supreme Court of the State of Mississippi, in Mobile, Jackson & Kansas City Railroad Company vs. Mary A. Hicks, et al., 91 Mississippi, p. 273, from which decision the writ of error was sued out, and resulted in the decision of the same case in this court under the designation of Mobile, Jackson & Kansas City Railroad Company vs. Turnipseed, supra. In that case the injury, for which suit was instituted occurred prior to the enactment of the statute.

The proposition was held to be without merit by the Supreme Court of the State of Mississippi, and any further argument in this court is "foreclosed" by the repeated decisions of this court, and it is difficult to understand why an attempt should be made to reopen the discussion, *except for purposes of delay.*

The Turnipseed case supra., was approved in Lindsley vs Natural Carbonic Gas Company, 220 U. S., p. 61, decided March 13th, 1911, many months before the injury was sustained by the Defendant in Error, for which he has asked for compensation, and which was allowed him by the Supreme Court of the State of Mississippi.

In Reitler vs. Harris, 223 U. S., p. 437, decided February 19th, 1912, long before this case was tried in the Circuit Court, this court held:

> That the statute of Kansas of 1907, Chapter 373, "Making entries of default and procedings for forfeiture made in usual course of business in the records of sales of school lands prima facie, but not conclusive evidence of the validity of forfeiture proceedings" is not unconstitutional even when applied to pending causes.

This court further said:

> "That such a statute does not offend against either the contract clause or the due process of law clause of the Constitution even where the change is made applicable to pending causes is now well settled.
>
> Pillow vs. Roberts, 13 How. 472-476.
> Marx vs. Hanthorn, 148 U. S. 172-181.

Turpin vs. Lemon, 187 U. S. 51-59.
Lindsley vs. Natural Carbonic Gas Co., 220 U. S. 61-81.
Curtis vs. Whitney, 13 Wall. 68.
Cooley's Const. Lim., 7th ed. 409, 524-526."

In the recent case of Luria vs. United States, 231 U. S., p 9, this fundamental principle is again reiterated. The court held:

"The establishment of a presumption from certain facts prescribes a rule of evidence and not one of substantive rights; and if the inference is reasonable and opportunity is given to controvert the presumption, it is not a denial of due process of law, Mobile, etc., Railroad Co. vs. Turnipseed, 219 U. S. 35, even if made applicable to existing causes of action.

The right to have one's controversy determined by existing rules of evidence is not a vested right and a reasonable change of such rules does not deny due process of law."

This court said: (page 26.)

"Nor is it a valid objection to such legislation that it is made applicable to existing causes of action, as is the case here, the true rule in that regard being well stated in Cooley's Constitutional Limitations, 7th ed. 524, in these words:

It must also be evident that a *right to have one's controversies determined by existing rules of evidence is not a vested right.* These rules pertain to the remedies which the State provides for its citizens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must, therefore, at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing cause of action, even in those States in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective even though some of the controversies upon which it may act were in progress before.

This court applied that rule in Webb vs. Den, 17 How. 576-578; Hopt. vs. Utah, 110 U. S. 574, 590; Thompson vs. Missouri, 171 U. S. 380; and Reitler vs. Harris, supra."

Mr. Cooley further says (after referring to certain decisions):

> "These and the like cases will sufficiently illustrate the general rule, that the whole subject is under the control of the Legislature, which prescribes such rules for the trial and determination as well of existing as of future rights and controversies as in its judgment will most completely subserve the ends of justice." Page 525.

Mr. Cooley's first work was issued in 1868, and subsequent editions were issued in 1871, 1874, 1878, 1883, 1890, 1896, and the last edition in 1903, and therefore these principles of law must have been familiar to every practitioner for many years.

It being thus established that *no law* has been violated by this enactment, it, of course, cannot be seriously argued that the Plaintiff in Error has been denied by the statute "the equal protection of the law."

It is therefore apparent that this argument, for it is nothing more, is not based upon reason, merit, precedent, or right, and is unquestionably frivolous.

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## IV.

## ACT OF 1908.

## ABOLISHING THE FELLOW SERVANT RULE AS TO ACTIONS BY RAILWAY EMPLOYEES.

(A copy of this Act appears on Pages 48 and 49 of the Record attached hereto.)

It is contended that this Act contravenes the Fourteenth Amendment to the Federal Constitution.

The proposition is so absolutely without merit that it can be justly characterized as FRIVOLOUS, and is interposed simply and wholly for the purpose of delaying final recovery; for an injury which occurred October 16th, 1911.

It is our purpose to make this *brief* what its name expresses, and we do not deem it necessary to cite the many cases which have *foreclosed a discussion* of the constitutionality of State statutes similar to the one enacted by the Legislature of the State of Mississippi, in this court, but we have appended for the purpose of ready reference, a number of cases defining the rules applicable to classification, and the subjects of such classification, which have been decided by this court.

This court in Magoun vs. Illinois Trust & Savings Bank, 170 U. S., pages 294 and 296, said:

> The "State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course.
>
> "There is, therefore, no precise application of the rule of reasonableness of classification. And the rule of equality permits many practical inequalities; and necessarily so. In a classification for governmentail purposes there cannot be an exact exclusion or inclusion of persons and things."

In the case of Missouri Railway Company vs. Mackey, this court said:

> "The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special, in its character, is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application."

And on page 210, the court stated:

> "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories."

This court thus referred in the last sentence to similar language employed by the Supreme Court of Iowa in Bucklew vs. Central Iowa Railroad Company, 21 Northwestern Rep. 103-107, which was incorporated in the opinion of the Supreme Court of Missouri in Missouri Pacific Railroad Company vs. Mackey, 6 Pacific, 201, from whose judgment the writ of error was prosecuted.

This court in Magoun vs. Illinois Trust & Savings Bank, 170

U. S. 283, cited by counsel for plaintiff in eror in the Supreme Court of Mississippi, said:

> "In some circumstances it (the State) may not tax A more than B, but if A be of a different trade or profession than B it may. And in matters not of taxation, if A be a different kind of a corporation than B, it may subject A to a different rule of responsibility to servants than B, Missouri Pacific Railway vs. Mackey, 127 U. S. 205, to a different measure of damages than B, Minneapolis & St. Louis Railway vs. Beckwith, 129 U. S. 26. And it permits special legislation in all its varieties. Missouri Pacific Railway Co. vs. Mackey, 127 U. S. 205; Minneapolis & St. Louis Railroad Co. vs. Herrick, 127 U. S. 210; Duncan vs. Missouri, 152 U. S. 377."

Another interesting case is Thomas Callahan vs. St. Louis Merchants Bridge Railway Company, decided by the Supreme Court of Missouri, December 10th, 1902, and reported in 170 Mo. 473, 71 S. W. 208, and affirmed by this court April 18th, 1904, on the authority of Tullis vs. Railroad Company, 175 U. S. 348-351, and cases cited. This case is reported in 194 U. S. 628:

> In this case "it appears the plaintiff was a member of the section gang that was doing the work. The work being done was directly necessary for the operation of the road. The particular work the plaintiff was doing was to warn passers-by of the danger incident to the negligent manner in which this work was being done, and to remove the ties from the street after the other members of the section gang had thrown them from the bridge to the street. Therefore, the work the plaintiff was doing was a part of the work being done by the section gang of which he was a member. It was negligence for the gang to throw the ties from the bridge down on to the street without first learning from the plaintiff that it was safe to do so. The practice before the accident was for them to first ascertain that fact from the plaintiff. In this instance they did not do so. They were negligent. The child was in a place of peril. The plaintiff went to it to remove it. He had a right to rely upon it that no ties would be thrown down until he notified the gang that it was safe to do so. He was, therefore, in discharge of his duty."
>
> It further appears, "defendant's servants above carelessly, without giving any warning of their intention to throw down a tie, and without receiving any signal from plaintiff that it was safe to do so, threw down a tie, which struck and injured the plaintiff.
>
> "He was engaged in the work of operating the railroad. He was within the protection of the law."

The court construed Section 2873, Rev. Stat. 1899, of Missouri:

> "That every railroad corporation owning or operating a railroad in this State shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroads by reason of the negligence of any other agent or servant thereof; provided that it may be shown that the person injured was guilty of negligence contributing as a proximate cause to produce the injury."

The court also reviewed the statutes of other States, and the decisions of the court thereon, and held:

> "A statute making a railroad company liable for injuries to servants through the negligence of fellow-servants does not violate the equality clause of the Federal Constitution, although it does not confine such liability to acts performed in the operation of trains, but extends it to risks similar to those incurred by the employees of persons or corporations engaged in other lines of work."

(Same case, 60 L. R. A. 249.)

In Watson vs. St. Louis, I. M. & S. Ry. Co., 169 Fed. Rep. 942, 949, Judge Trieber said:

> "The object of Congress in the enactment of the law was to protect the men employed in this hazardous occupation, in which thousands are annually killed or maimed without any fault of the master himself, but by the negligence of other employes, over whom the servant has no control, and in whose selection he had no voice. The legislation is neither new nor revolutionary * * * A similar Act was passed by the English Parliament as early as 1880, and among the States of the Union a large number have either abolished the fellow-servant rule entirely or modified it materially in respect to employes engaged in hazardous occupations; many of them limitng the change to railroads. Among these are Alabama, Arkansas, California, Counnecticut, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Wisconsin, Virginia and Wyoming, all of which acted on that subject long before Congress. Similar statutes have also been for a long time in force in most of the continental States of Europe. This evidences that such legislation is in compliance with the demands of an enlightened public opinion. To effect this purpose it is wholly immaterial what the employment of the fellow-servant is. Public opinion, as expressed through the legislative departments of the nation, as well as many of the

> States, evidently considered it an injustice that persons injured, or in case of death, the surviving members of the family, should become burdens on the public and objects of charity, and therefore considered it better public policy that the employer should be required to make some provision for them, charging the moneys thus expended to expenses of management, or cost of production, and collect it indirectly from the public."

In Chicago, B. & Quincy R. R. Co. vs. McGuire, 219 U. S. 549, it appeared that:

> "The question presented is with respect to the validity of Section 2071 of the Code of Iowa, as amended in the years 1898, which was held to preclude the railroad company from making the defense that recovery was barred by the acceptance of benefits under a contract of membership in its Relief Department."

The court held:

> "The statute does not necessarily deny equal protection of the law because limited to railway employes of a certain class."

In a note to Bradford Construction Company vs. Heflin (88 Miss. 314) 12 L. R. A., New Series, p. 1040, the author says:

> "So far as laws abrogating the fellow-servant rule duly apply to railroads, they have been generally upheld, the courts holding that, the employment of railroading being especially hazardous, the legislatures are justified in passing laws affecting such employment, which will apply to railroads only, and such laws will not be deemed unconstitutional as denying to railroads equal protection of the laws."

Chief Justice White in Missouri Pacific Railway Company vs. Castle, 224 U. S. 541-544, said:

> "This court has repeatedly upheld the power of a State to impose upon a railway company liability to an employee engaged in train service for an injury inflicted through the negligence of another employee in the same service. Missouri Pacific Railway Company vs. Mackey, 127 U. S. 205; Minneapolis & St. L. Ry. Co. vs. Herrick, 127 U. S. 210; Tullis vs. Lake Erie & W. Railway Company, 175 U. S. 348; Chicago, K. & W. R. Co. vs. Pontius, 157 U. S. 209; and Mondou vs. New York N. H. & H. R. Co., 223 U. S. 1."

See also note to Louisville & N. R. R. Co. vs. Melton, 218 U. S. 36. 47 L. R. A., New Series, p. 84, where the author discusses cases in Alabama, Arkansas, California, Colorado, Florida, Indiana, Iowa, Michigan, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, South Dakota, Texas, Virginia and Wisconsin, relating to railway companies, and their liability for the acts of fellow-servants.

Mr. Labatt, in his late treatise on Master and Servant, Second Edition, pp. 8864 et seq., discusses the constitutionality of statutes, "Modifying the common law liabilities of an employer for injuries sustained by his employes," and cites as sustaining their constitutionality cases from the courts of the following States: Indiana, New Jersey, New York, Colorado, Arkansas, Mississippi, Georgia, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, North Carolina, Ohio, Texas, Utah, Virginia and Wisconsin, and many, if not all, of these cases, were decided prior to the date of the injury for which this suit was brought.

A recent Oklahoma case is Kreps vs. Brady, 133 Pac. 216. This case and Missouri Pac. R. Company vs. Smith, decided by the Supreme Court of Kansas are reported in 47 L. R. A. (N. S.), and an elaborate note to the latter case also appears in the said volume, p. 113 et seq.

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## RECENT CASES WHEREIN THE CLASSIFICATION UPHELD ESPECIALLY REFERS TO RAILROADS.

A State regulation applying to all railroads of the class to which it relates, although it does not apply to railroads less than fifty miles in length.

Chicago R. I. & P. C. R. R. V., Arkansas, 219 U. S. 453.

An Arkansas statute which provides that railroad corporations operating within the State whether incorporated or not, engaged in the *mining of coal*, liable for injuries caused by the negligence of fellow-servants.

Aluminum Company vs. Ramsey, 222 U. S. 251.

"A State also has power to modify or abolish the common law rule of contributory negligence and provide by statute that damages to an employee of the railroad company shall only be diminished by reason of his contributory negligence in proportion to the amount of negligence attributable to him."

Missouri Pacific R. R. Co. vs. Castle, 224 U. S. 541.

"Classification in a rate making statute of railroads less than fifty miles in length (by the State of West Virginia) does not render the statute unconstitutional as violating the equal protection provision of the Fourteenth Amendment."

"A classification excepting electric lines and street railways from a railroad rate statute is reasonable and proper and does not offend the equal protection clause of the Fourteenth Amendment. Omaha & Council Bluff Ry. Co. vs. Interstate Commerce Commission (230 U. S.), p. 324.

Ches. & Ohio Ry. vs. Conley, 230 U. S. 513.

"The equal protection of the laws clause of U. S. Const. Fourteenth Amendment, cannot be deemed to be infringed by the provisions of Georgia Pub. Laws 1908, pp. 50-51, requiring railway locomotives running on the main line to be equipped with electric headlights, merely because the Act may not apply to receivers operating railways, in view of the temporary and special character of receivers' management."

"The exceptions in favor of tram roads, mill roads, engaged principally in lumber, or logging transportaiton in connection with mills, made by Georgia Pub. Laws 1908, pp. 50-51, when requiring railway locomotives running on the main line to be equipped with electric headlights do not render the statute repugnant to U. S. Const., Fourteenth Amendment, as denying equal protection of the laws."

Atlantic Coast Line R. R. Co. vs. Georgia (Mss. Opinion) No. 16, July 5th, 1914, p. 829.

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## V.

## RULES RELATING TO CLASSIFICATION.

"The State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course.

"There is therefore no precise application of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so.

"In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 283.

"There cannot be an exact exclusion or inclusion of per-

sons and things in a classification for governmental purposes, and a general classification, otherwise proper, will not be rendered invalid because certain imaginary and unforeseen cases have been overlooked. In such a case there is no substantial denial of the equal protection of the law within the meaning of the Fourteenth Amendment."

Ozan Lumber Company vs. Union County Bank, 207 U. S., 251.

"Legislation which regulates business may well make distinctions depend upon the degrees of evil, without being arbitrary, unreasonable, or in conflict with the equal protection provisions of the Fourteenth Amendment to the Federal Constitution."

"This court will not limit the power of the State by declaring that because the judgment exercised by the Legislature is unwise it amounts to a denial of the equal protection of the laws or deprivation of property or liberty without due process of law."

Heath & Milligan Co. vs. Worst, 207 U. S. 338.

"The equal protection provision of the Fourteenth Amendment did not deprive the States of the power to classify but only of the abuse of such power; nor is the clause offended against because some inequality may be occasioned by a classification in legislation properly enacted under the police power."

"A classification in the State police statute proper as to a general class, is not unconstitutional under the equal protection clause of the Fourteenth Amendment because it ignores inequality as to some persons embraced within the general class."

Louisville & Nashville R. R. Co. vs. Melton, 218 U. S. 36.

Courts "cannot set aside legislation because it is harsh."

Sheylin, Carpenter Co. vs. Minnesota, 218 U. S. 57, 70.

"Classification will not render a State police statute unconstitutional as denying equal protection of the law so long as there is a reasonable basis for such classification; nor will exceptions of specified classes render the law unconstitutional unless there is no fair reason for the law that would not equally require its extension to the excepted class. (William vs. Arkansas, 217 U. S. 79.)"

Watson vs. Maryland, 218 U. S. 173.

"Classification on a reasonable basis of subjects, within the police power, is within legislative discretion and a reasonable selection which is not merely arbitrary, and without real difference, does not deny equal protection of the laws within the meaning of the Fourteenth Amendment."

Griffith vs. Connecticut, 218 U. S. 563.

"The broad words of the Fourteenth Amendment are not to be pushed to a drily logical extreme, and the courts will be slow to strike down as unconstitutional legislation of the States enacted under the police power."

"The Fourteenth Amendment does not prohibit States from forbidding a man to do things simply because he might do them at common law."

Noble State Bank vs. Haskell, 219 U. S. 104.

"The States have never surrendered the power to care for the public safety; and the validity of police statutes enacted to that end which are not purely arbitrary or in conflict with a power granted to the general government cannot be questioned in Federal courts.

Chicago, R. I. & Pac. Ry. Co. vs. Arkansas, 219 U. S. 453.

"Neither the excellence nor the defects of the legislative scheme may be permitted to determine the constitutionality of the State statute; in this court the only question is, whether the statute transcends the limits of power defined by the Federal Constitution."

"The Legislature, provided that Acts within constitutional limitation is the arbiter of the public policy of the State."

Chicago, B. & Quincy R. R. Co. vs. McGuire, 219 U. S. 549.

"The equal protection clause of the Fourteenth Amendment admits of a wide exercise of discretion and only avoids a clasification which is purely arbitrary being without reasonable basis; nor does a classification having some reasonable basis offend because not made with mathematical nicety or resulting in some inequality."

"This court will assume the existence at the time the statute was enacted of any State of facts that can reasonably be conceived and which will support a classification in a State statute attacked as denying equal protection of the law.

"The burden of showing that a classification in a State

statute denies equal protection of the law as not resting on a reasonable basis is on the party assailing it."

Lindsley vs. Natural Carbonic Gas Co., 220 U. S. 61.

"The Legislature of the State is itself the judge of means necessary to secure the safety of those engaged in a dangerous business, and only such regulations as are palpably arbitrary can be set aside as violating the due process provision of the Fourteenth Amendment.

"The equal protection provision of the Fourteenth Amendment requires laws of like application to all similarly situated, but the Legislature is allowed wide discretion in the selection of classes."

"It is the province of the legislature to make the laws and of the court to enforce them.

"Courts will not interefere with a police statute on the ground that the classification is so arbitrary as to deny equal protection of the laws unless it appears that there is no fair reason for the law that would with equal force not require its extension to others whom it leaves untouched. Missouri, Kansas & Texas Ry. vs. May, 194, U. S. 267."

Barrett vs. State of Indiana, 229 U. S. 26.

"The legislature having the power of classification, has also the power to select the differences on which to base the classification."

"The State is not bound to rigid equality by the equal protection provision of the Fourteenth Amendment: classification simply must not be exercised in clear and hostile discrimination between particular persons and classes."

Citizens Telephone Co. vs. Fuller, 229 U. S. 322.

"Whether or not a classification merely between all corporations and partnerships and individuals offends the equal protection clause, a classification of corporations operating railroads and individuals does not offend that provision of the Constitution."

"One within a distinct class, which is properly subject to classification cannot question the constitutionality of the classification on the ground that it is too broad and includes others outside of that class."

Aluminum Co. vs. Ramsey, 222 U. S. 251.

"Equal protection of the law is not denied where the

classification is not so unreasonable and extravagant as to be merely an arbitrary mandate."

City of Chicago vs. Sturges, 222 U. S. 313.

"A State does not deny equal protection of the laws by adjusting its revenue laws to favor certain industries.

"A State, like the United States, although with more restrictions and to a less degree, may carry out a policy even if the courts may disagree as to the wisdom thereof.

"In carrying out its policy, a State may make discriminations so long as they are not unreasonable or purely arbitrary."

Quong Wing vs. Kirkendall, 223 U. S. 59.

"The fact that a law may be faulty does not demonstrate its invalidity under the Federal Constitution; even though it may seem unjust and oppressive it may be free from judicial interference."

"Mere errors of government are not subject to judicial review by this court; and only a palpably arbitrary exercise of authority can be declared void under the Fourteenth Amendment."

Metropolis Theatre Company vs. City of Chicago, 228 U. S. 61.

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## VI.

## PARTICULAR CLASSIFICATIONS HELD VALID.

Having thus reviewed some of the cases defining classifications, which are not obnoxious to the provisions of the Federal Constitution, reference will now be made to some of the State laws, prescribing classifications which have been upheld by the Federal Courts, and their constitutionality maintained.

### REVENUE LAWS.

Taxing Telephone Companies whose receipts exceeded $500.00. Michigan Telephone Tax Cases, 185 Fed. Rep. 634. Affirmed 229 U. S. 322.

License Tax on Itinerant Dealers of Sewing Machines, although not imposed on sellers of machines at regularly established places of business.

Singer Sewing Machine Co. vs. Brickell, 199 Fed. Rep. 654.

Inheritance tax law of Illinois enacted June 15th, 1895.

Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 283, cited by counsel for plaintiff of error in the Supreme Court of Mississippi.

Oklahoma Acts subjecting State banks to assessments for a Depositor's Guaranty Fund.

Noble State Bank vs. Haskell, 219 U. S. 104.

Oklahoma Acts creating a guaranty fund creating privileges in favor of incorporated banks with a surplus of ten per cent. which does not confer the same privileges on unincorporated banks, nor incorporated banks whose surplus does not equal ten per cent.

Assaria State Bank vs. Dolley, 219 U. S. 121.

A State tax upon certain and not all transfers of real or personal property.

Keeney vs. New York, 222 U. S. 525.

The law of Montana imposing a tax on hand laundries, and not on steam laundries, and which exempts laundries employing not more than two women.

Quong Wing vs. Kirkendall, 223 U. S. 59.

A lincense tax graded according to prices of admission to theatres.

Metropolis Theatre Co. vs. Chicago, 228 U. S. 61.

The Kansas Bank Depositor's Guaranty Act, which is alleged to discriminate against National Banks in favor of State Banks.

Abilene National Bank vs. Dolley, 228 U. S. 1.

State Tax on interest bearing deposits in National Banks and exempting non-bearing interest accounts.

Clement National Bank vs. Vermont, 231 U. S. 120.

The tax law of New York imposing a tax of two cents a share on transfers of stock which only applies to transfers of stock, and is based on its par and not market value.

Hatch vs. Reardon, 204 U. S. 152.

The Ohio statute of 1911 imposing an excise tax of four per cent. on gross intrastate earnings of railroad companies.

Ohio Tax Cases, 232 U. S. 576.

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## LAWS REGULATING LABEL.

The North Dakota statute requiring manufacturers and vendors of mixed paints to label the ingredients composing them, and which does not apply to paste paints.

Heath & Milligan Co. vs. Worst, 207 U. S. 338.

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## LAWS RELATING TO BUILDINGS.

The Massachusetts statute prescribing different heights of buildings in different sections of the City of Boston.

Welch vs. Swasey, 214 U. S. 91.

The Illinois statute providing for the protection of elevating and hoisting machinery in buildings under construction.

Chicago Dock Co. vs. Fraley, 228 U. S. 681.

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## LAWS PROHIBITING SALE OF DRUGS.

A Louisiana statute prohibiting the sale of drugs, etc., by itinerant vendors or peddlers.

Baccus vs. Louisiana, 232 U. S. 334.

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## LAWS REDUCING FREIGHT RATES BY RAILROAD COMMISSION.

Reduction of freight rates by the California Railroad Commission which does not apply equally to all competing lines.

Southern Pac. Co. vs. Railroad Commission of California, 193 Fed. Rep. 699.

## LAWS RELATING TO MINES.

Arkansas Acts requiring coal to be measured for payment of minors' wages before screening.

McLean vs. Arkansas, 211 U. S. 539.

Statutes applying to mines only where more than ten miners are employed.

McLean vs. Arkansas, 211 U. S. 539.

Indiana statute requiring entries into certain mines to be not less than two feet in width, which included bituminous coal mines and excluded block coal mines.

Barrett vs. Indiana, 229 U. S. 26.

A Pennsylvania statute requiring owners of adjoining coal property to cause barrier pillars to be left a suitable width to safeguard employes.

Plymouth Coal Co. vs. Pennsylvania, 232 U. S. 531.

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## LAWS RELATING TO LABOR.

A State statute may prohibit the employment of persons of tender years in dangerous occupations.

Sturges & Burn vs. Beauchamp, 231 U. S. 320.

A statute of Masachusetts limiting the hours of labor in factories for women.

Riley vs. Massachusetts, 232 U. S. 671.

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## MISCELLANEOUS.

Authorizing defenses to notes given in payment of patented articles which do not apply to merchants and dealers who sell them in the usual course of business.

Ozan Lumber Co. vs. Union County Bank, 207 U. S. 251.

The Mineral Springs Act of New York regulating the pumping of mineral water from wells bored or drilled into the rocks for the purpose of collecting the gas and vending it apart from the water.

Lindsey vs. Natural Carbonic Gas Co., 220 U. S. 61.

A classification including cities and excluding unincorporated sub-divisions of the county which imposed liability for damages caused by mob violence.

Chicago vs. Sturges, 222 U. S. 313.

Providing for a system of sewers and compelling property owners to connect therewith.

Hutchinson vs. Valdosta, 227 U. S. 303.

The Pennsylvania statute making it unlawful for an unnaturalized foreign-born resident to kill wild game except in defense of person or property and to that end making the possession of shotguns and rifles unlawful.

Patsone vs. Pennsylvania, 232 U. S. 138.

A municipal ordinance of Milwaukee which subjects vendors of milk drawn from cows outside of the city to different regulations than the vendors of milk drawn from cows within the city.

Adams vs. Milwaukee, 228 U. S. 572.

Exempting farmers' mutual insurance companies organized and doing business under the laws of the State, and insuring only farm property, from the legislative scheme for regulation of fire insurance rates, as is done by Kas. Laws 1909, Chap. 152.

German Alliance Insurance Company vs. Lewis, Mss. Opinion, June 1st, 1914, No. 13, p. 612.

Law of the State of Missouri prohibitng insurance companies from denying that the property insured was worth at the time the policy was issued, the full amount of the insurance less any subsequent depreciation in value.

Orient Insurance Co. vs. Daggs, 172 U. S. 557.

It seems singular that when it is gravely asserted that an Act is unconstitutional in the Supreme Court of a State no adjudication is cited to sustain such an attack.

In the briefs of counsel in the Supreme Court of the State of Mississippi, no case was disclosed which sanctioned the argument that the law was invalid, and the cases referred to were mainly relied upon by the defendant in error, or were enumerated under an attempted general classification, and which did not support the attempt.

It was contended, whether seriously is a matter of doubt, that the Act of 1908 was unconstitutional, because: First: It was confined to railroads operating dangerous instrumentalities, "*Running on Tracks.*"

Second: It did not apply to traction engines, and taxicabs, running on highways and not on tracks.

Third: It did not apply to steamboats navigating the rivers of the State.

Fourth: It did not apply to street railways operated with a cable.

It may be sufficient to say that as the defendant company was operating a railroad and the injuries resulted from the neglect of its employes while operating said railroad, it has no right to complain. This court in Aluminum Co. vs. Ramsey, 222 U. S., p. 251, says:

> "What grievance plaintiff in error might have if it were not operating a railroad we are not called upon to consider, because it is limited in its complaint to the effect of the statute on it and cannot appropriate the grievance that corporations engaged in mining, but not operating railroads, may have on account of the distinction made between them and individuals.

Every objection above noted, and any others of a similar character, could have been made to all this legislation, relating to railroads, which has been in force in some form or other for forty or more years.

It is a matter of common knowledge that steamboats have been in commission before any railroad system was inaugaurated.

It is inconceivable in view of this long array of authoritative adjudications, sustaining such legislation, the fact, that steamboats were not included, escaped the attention of the learned courts, or was overlooked by the distinguished lawyers representing the railroads, if their exclusion would have rendered the law unconstitutional. It must be conclusively admitted, that every question pertinent in the consideration of this doctrine, was dili-

gently presented, and steamboats were therefore deliberately excluded from further consideration, when the conclusion was reached, that railroads, as a class, are peculiarly the subject of special legislation.

It is not even to be considered that the courts, in their construction of these statues regarded as material, the policy of the government as applied, by express enactment to ships; or as stated in Transportation Company vs. Wright, 13 Wall. 104:

> "The great object of the law, (limiting liability of ship owners) was to encourage ship building and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and to work ships are generally unable to build and fit them—on the other hand, those who have capital and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, (and of rivers) and to the management of seafaring men, without making them liable for additional losses and damages to an indefinite amount."

The same considerations apply, of course, to taxicabs and traction engines running on highways.

These taxicabs and traction engines have been excluded from every classification relating to railroads enacted by any State, nation or government, and the fact of their exclusion has never served to invalidate the classification.

It may be possible that there were no taxicabs, nor such traction engines in existence in certain States, when these laws were passed, but be that as it may, it is idle to maintain, that because certain vehicles using either steam, electricity, gas, gasoline or lever power, and running on the ground, are not embraced in this statute, the law must be declared invalid, in favor of a railroad, running on tracks, as it must, and its employee, permanently injured while on an engine, running on tracks, and propelled by steam, should be denied relief.

With all due respect, we inquire, how can a railroad engine and cars, properly run on anything else but tracks? The very term "railroad" expresses and implies both "rails" and "tracks."

The Century Dictionary defines "railroad," "A road upon which are laid one or more lines of rails to guide and facilitate the movement of vehicles designed to transport passengers, or freight, or both."

"Railway," "a way composed of one or more rails, or lines of rails, for the support, and commonly also for the direction of the

motion, of a body carried on wheels adapted to roll on the rail or rails, or lines of rails."

A street railway car attached to a cable, and running on tracks and propelled by the dangerous agencies enumerated in the statute, is also included therein. A fact that seems to have been admitted in the Supreme Court of Mississippi, by the learned counsel for the plaintiff in error.

In view of the rapid material development peculiar to this era if an Act is to be declared nugatory because it does not embrace boats and barges navigating waters, and taxicabs and engines running on the ground, then it may be asserted with the same degree of plausibility that it is invalid, because it does not embrace biplanes, aeroplanes, hydroplanes, Zeppelins, balloons, airships, and eventually aircars, traversing the atmosphere.

If special legislation, relating to railroads only, must include every instrumentality capable of transporting passengers and merchandise, whether in the air, on the ground, or on the water, to insure its validity, then special legislation is at an end. It could be maintained with the same propriety and vigor that there should be included elevators operated by steam or electricity.

It may be possible that the law-makers of Mississippi inserted the words "running on tracks," to avoid any attack based upon the views announced in Bradford Construction Company vs. Hedin, 88 Miss. 315, where it was stated, "One employed to shovel dirt from between construction cars pushed there from such cars by the plow attached to the engine, by a cable, is a fellow-servant of the engineer as to an injury caused by the engine starting while the employee was assisting in replacing the plow in position," and therefore could not recover.

We conclude by quoting from the holding the Supreme Court of Mississippi:

"Now as to the contention that Chapter 191 violates the equality clause of the Fourteenth Amendment of the Constitution of the United States: Counsel for appellant contend that this violation is accomplished by the inclusion of the words "and running on tracks." We cannot agree with counsel that this is so. It has been held that Section 193 of the Constitution excludes all railroads except commercial railroads, or those engaged in the business of common carrier. We see in the Act of the Legislature the purpose to extend the remedy provided by the abrogation of the fellow-servant doctrine to all employes of all railroad corporations, including the commercial railroads, and including also all other railroads, such as logging railroads and those connected with lumber and other enterprises using such engines, locomotives, and cars 'running on tracks.' We

understand the words 'running on tracks' to define such engines, locomotives, and cars propelled by the several dangerous agencies named as are used in all of the different kinds of railways. The statute was meant in its broad expression to exclude no kind of railways in Mississippi. The statute provides that the remedies extend to all employes using engines, locomotives, or cars owned and operated by railroad corporations and all other corporations and individuals. In short, the class made by the statute is all employes using such engines, locomotives, and cars of all kinds and descriptions propelled by the dangerous agencies specified and running on tracks, that is, on a defined way such as used by railroads. We deem this a reasonable classification which applies equally to all in the same situation.

In the case of Aluminum Co. vs. Ramsey, 222 U. S. 251, 1 N. C. C. A. 184, 32 Sup. Ct. 76, 56, L. Ed. 185, the constitutionality of a statute in Arkansas abolishing the fellow-servant rule as to corporations operating railroads in that State was upheld. The court, speaking through Justice McKenna, said:

> 'The statute constitutes a class of corporations operating railroads, and under the cases we have cited the classification is valid, there being equality within the class.'

We find the Arkansas statute as broad in its terms as the Mississippi statute now under consileration. This statute abolished the doctrine of common employment as regards railroad companies, all corporations of every kind, and every company, whether incorporated or not, engaged in the mining of coal.

We fully appreciate the force of the argument made by counsel for appellant that employes at work upon traction engines or motor cars not running on tracks should be included. It may be that in the future, when we have new, solid, and stable highways throughout the rural districts, and when the streets in the towns are all paved, that traction engines and motor cars shall be so generally used as to justify the formation of a class to receive the benefits from the abrogation by the Legislature of the fellow-servant rule. At present, and under the conditions now existing, we cannot see that the prospect of the advisability at some time in the future for such classification can, in any manner, interfere to declare unreasonable and unequal the formation of the present class for the benefits of such provision.

It is clear to us that Chapter 194 of the Act of 1908 makes a reasonable and sufficient classification, and is not repugnant to the equality clause of the Fourteenth Amendment."

## VII.

## MOTION TO AFFIRM.

We respectfully submit it is apparent from the overwhelming array of decisions both in this Court and in the State Courts, rendered prior to the trial of this case in the Circuit Court maintaining the integrity of these statutes, that the writ of error was taken solely for delay, and that the questions presented are so frivolous as not to need further argument, and are absolutely without merit. We further submit that the rule announced in Amory vs. Amory, et al., 91 U. S. 356, should be applied here. Chief Justice Waite said:

> "We deem it not improper to say that this power (to assess damages) will be exercised without hesitation in all cases where we find that our jurisdiction has been invoked merely to gain time."

And this practice of presenting to this court, on appeal or writ of error, so-called Federal questions which have been previously decided in so many cases as to render argument unnecessary, may have had some influence in the adoption of the present sub-division 5 of Rule 6:

"The court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and control such motion as is provided for in cases of motions to dismiss under Paragraph 4 of this rule."

If jurisdiction is maintained we invoke the rule announced by the Missouri Pacific Railway Co. vs. Castle, 224 U. S. 541, wherein Chief Justice White said:

> "Defendant in error moves to affirm the judgment under Sub-division 5, of Rule 6. The motion we think should prevail, since the questions urged upon our attention as a basis for a reversal of the judgment have been so plainly foreclosed by decisions of this court as to make further argument unnecessary."

If this court holds that this case should be affirmed, we respect-

fully request that interest and 10 per cent. damages be allowed as authorized by Sub-division 2, Rule 23.

Respectfully submitted,

J. Hirst

*Of Counsel for Defendant in Error.*

Hirst, Dent & Lander &
E. L. Dent

*Of Counsel for*
*Defendant in Error.*

# RECORD.

## PORTIONS OF THE RECORD EMBODYING ALL THE MATERIAL AND PERTINENT PARTS OF TRANSCRIPT, WHICH RELATE TO THE MOTION FILED HEREIN.

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STATE OF MISSISSIPPI. } **IN THE CIRCUIT COURT.**
COVINGTON COUNTY. } TO JANUARY TERM, 1911.

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S. W. PIERCE, *Plaintiff.*

*vs.*

EASTERLING LUMBER COMPANY et al., *Defendants.*

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S. W. Pierce, by his attorneys, complains of the Easterling Lumber Company, a corporation domiciled and doing business at Ora, in Covington County, and State of Mississippi, Will Tatum and John Tatum, residents and citizens of Ora, in Covington County, and State of Mississippi, and for cause of action alleges as follows, to-wit:

For that whereas, heretofore, to-wit: On or about the 16th day of October, A. D., 1911, the said defendant, the Easterling Lumber Company, owned and operated a saw mill in the town of Ora, and it owned and operated in connection therewith a railroad line, log road or dummy line for the purpose of hauling logs and lumber to and from said mill and on and over said line of railroad it runs, and on said day did run engines and trains of cars propelled by the agency of steam.

That on said date and prior thereto, the said defendant, Will Tatum, was an employee of said defendant, the Easterling Lumber Company, and was the vice-principal, foreman and duly authorized representative and agent of the said defendant, the Easterling Lumber Company. He had full charge and control of said railroad, logging road or dummy line, owned and operated, as aforesaid, and for the purposes aforesaid, and he had full power and authority to direct, and did direct, the movements and running of any and all engines, trains and cars, on and over said railroad, log road, or dummy line, and he had full power and authority to direct the services of this

plaintiff, who, at said time, was an employee of the said defendant, the Easterling Lumber Company. That said Will Tatum had full control, supervision of, and over any and all employes connected with or operating said line of railroad, as aforesaid. He had authority to employ and discharge any and all employes operating said line, and it was his duty to employ competent and efficient men to run all engines and trains on and over said line.

That on said date aforesaid, said defendant, John Tatum, was an employee of the said defendant, Easterling Lumber Company, and was engaged as a fireman on one of its engines commonly known and called the "Shay Engine," which was run and operated on and over said line, and on the morning of said date, a short time before the injury and negligence hereinafter complained of, it was several miles out on said line at what was commonly known and called the logging camps of the said defendant, the Easterling Lumber Company.

Plaintiff avers, that on said date, as aforesaid, he was an engineer, in charge of and running one of the engines of said defendant, the Easterling Lumber Company, on and over said railroad as aforesaid, by and under the supervision and direction of the said defendant, Will Tatum, who had full and complete control of said line, as aforesaid, and who directed the movement of all the engines and trains along and over said line, as aforesaid, as his, the said Tatums' independent judgment and discretion dictated.

That on the morning of said date, aforesaid, plaintiff took charge of his engine and was ordered by said defendant, Will Tatum, to run it on and over said line, and while pursuing his duties, as engineer, and while acting in obedience to the orders and directions of said Will Tatum, foreman, as aforesaid, plantiff, with due care and diligence, undertook to run his engine and train of cars on and over said line in a westerly direction from said mill towards the said logging camp, or station, as aforesaid; that in accordance with the rules and regulations by which said railroad was operated plaintiff's engine and train had the right-of-way, paramount or superior right, on and over said line, over any and all other engines, trains and cars that were run, or to be run, on and over the same, and while his engine and train was running thereon from said mill to said logging camp no other engine, or train, had any right to be thereon.

That notwithstanding the fact that plaintiff's engine and train had superior rights on and over said line, while running thereon in obedience to said orders and in accordance with the rules and regulations aforesaid, when he had proceeded to run said engine, and train, some ten or twelve miles thereon towards said station, the *said defendants' negligently run*, or caused to be negligently run on or over said line, the said "Shay Engine," or train upon, over and

against the engine, which was being properly run, and properly operated by this plaintiff, and thereby caused a "head-on" collision by and between his engine and the said "Shay Engine," which was being negligently run towards his engine and out of time and without any right to be on said line, by the said John Tatum, who was not an engineer, but only a fireman and, who was not competent to run and manage an engine.

That plaintiff's engine had the right-of-way, as aforesaid, and the said Shay engine, which collided with the plaintiff's engine, had no right to be run on or over said track at the time said collision occurred and *this all of the defendants well knew.*

That by reason of the fact that said defendants permitted said Shay engine to negligently run upon, over and against said engine that was being run by plaintiff, he was greatly and permanently injured in both mind and body in the collision caused thereby.

That said collision between said engines was caused by the concurrent gross negligence, carelessness, mis-conduct and mis-management of the said defendants, the Easterling Lumber Company, and the said John Tatum, and Will Tatum.

Plaintiff says that the negligence of the said defendants proximately produced his injuries, and but for their gross negligence, improper acts and conduct in permitting said "Shay Engine" to be run on and over the said line towards, upon and against his engine, at a time when it had no right to be run thereon, the plaintiff would not have received his injuries.

Plaintiff alleges that the said defendant, the Easterling Lumber Company and the said Will Tatum were negligent in permitting said train to be run on and over said line when the engine and train that was being run by the plaintiff had the right-of-way, paramount or superior right thereon to the said "Shay Engine," as aforesaid, and the said John Tatum was negligent in running or attempting to run said "Shay Engine," on and over said line *at the time* of said collision; that the said John Tatum was not competent to run said "Shay Engine," and he had no right to run it on and over said line at said time, and his inability and incompetency to run said engine was known to him and to the said defendant, the Easterling Lumber Company, and the said Will Tatum, foreman.

Plaintiff says that he was horribly and permanently crippled in said collision. His leg and ankle were crushed and broken; his body and all parts thereof bruised and made sore and he is horribly and permanently injured, and will suffer in body and mind as long as he lives.

Plaintiff, therefore, says that on account of said injuries, he has suffered great pain of body and anguish of mind, and he has been

put to great expense, for medical and surgical attention, and that he has been, ever since he received said injuries, incapacitated for work, and that his said injuries are permanent, and his earning capacity has been practically destroyed by the negligent acts of the said defendants, which produced his said injuries, to his great damage, in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00), wherefore he brings this suit and demands judgment against the said defendants.

HIRSH, DENT & LANDAU,
Attorneys for Plaintiff.

Filed Nov. 18, 1911.

PRESSLEY WATTS,
Clerk.

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(Title of Cause.)

## PLEAS AND NOTICE OF DEFENDANTS.

Now come the defendants in the above styled and numbered cause, by their attorney, and for plea to plaintiff's declaration therein filed against them, say that they are not guilty of the said supposed wrongs, injuries and trespasses in the manner and form as alleged against them, nor any part thereof, and of this, they put themselves upon the country.

EASTERLING LUMBER COMPANY,
WILL TATUM, and
JOHN TATUM.
By T. BRADY, JR.,
Their Attorney.

The plaintiff will take notice that the defendant, Easterling Lumber Co., will show upon the trial of this cause that plaintiff's injury was caused by his own gross negligence in running his engine and train over this portion of the track upon which the train with which his train collided had the right-of-way. That the plaintiff violated the orders of the defendant and ran his engine over the "Y" of the defendant upon which the Shay Engine had the right-of-way, and was grossly negligent in so doing. That the plaintiff was injured by his own negligence and the negligence of a fellow-servant of plaintiff, and not by any negligence of the Easterling Lumber Company.

Filed this 30th day of November, 1911.

PRESLEY WATTS,
Clerk.

(Title of Cause.)

## PLEAS OF EASTERLING LUMBER COMPANY.

Now comes the Easterling Lumber Company, by its Attorney, and says that it is not guilty of the said supposed wrongs and injuries in the manner and form alleged in plaintiff's declaration, or of any part thereof and of this it puts itself upon the country.

EASTERLING LUMBER COMPANY.
By T. BRADY, JR.,
Attorney.

The plaintiff will take notice that the defendant will offer under the general issue in this case evidence to show that the plaintiff was guilty of gross negligence by running a train in violation of the orders of the defendant, Easterling Lumber Company, upon its "Y," at a time when its Shay engine had the right-of-way. That the said plaintiff should have watched at the "Y" until the Shay had left the "Y," and should have blown the signals which he failed to do thereby being guilty of gross negligence. That the defendant was not negligent. That the negligence was that of plaintiff and was gross.

EASTERLING LUMBER COMPANY.
By T. BRADY, JR.

No. 482.
Filed 2d day of July, 1912.

DAN WILLIAMSON,
Clerk.
By V. T. DEESE, D. C.

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(Title of Cause.)

## SPECIAL BILL OF EXCEPTIONS AND ORDER OF COURT.

Now comes the defendant and files this, a special bill of exceptions to the action of the court in refusing to allow it after the plaintiff rested, and before it offered proof in the case, to file a notice under its general issue, which notice was as follows, to wit:

The plaintiff will take notice that the defendant will show affirmative evidence, and will offer by affirmative evidence, and tending to show under its plea of general issue, that the injuries suffered by the plaintiff then and there occurred through, and the act of a fellow servant, then and there engaged about the same work, and for which the defendant is not responsible; but whose negligence, if any, was one of the assumed risks taken by the said plaintiff at the time of his employment, and that the statutes of the State of Mississippi, Chapter 194, 1908, page 204, if applied to the injury in

question violates the Federal Constitution in that it is contrary to the Fourteenth Amendment thereof, denying to the defendant the equal protection of the laws; depriving it of its liberty and property without due process of law, in that under the said Constitution of the United States the said State of Mississippi is wholly without the power to pass an Act which applies to every employee of certain persons without regard to the nature of the employment or such employes, and in that an Act so applied will violate said Federal Constitution and that said statute cannot be severed judiciously, as so to do would be judicial legislation, and that to impose liabilities upon this defendant in this cause by reason of said action would be violative of the Federal Constitution.

And, furthermore, that said Act is void because violative of said Constitution, because it deprives defendant of its liberty and property without due process of law, and denies to it the equal protection of the law. That the said paintiff then and there assumed the risk incident to the running of engine No. 6, and the Shay engine; that the said defendant, the Easterling Lumber Company, was not guilty of any actionable negligence; that the said plaintiff was guilty of negligence of approximately causing and contributing to his said injury in that he did not at the time of said injury and immediately prior thereto conduct as an ordinary, prudent person would or should have done, and then and there refused for his own safety, and wholly, and refused to stop said engine, and thereby prevent and wholly fail to observe the rules of defendant not to enter upon said "Y" without protecting against said Shay engine, and without waiting for said Shay engine.

That both of the Easterling Lumber Company's co-defendants or fellow-servants, of the plaintiff in this case, and all negligence on their part does not entitle the plaintiff to recover in this case since the plaintiff assumes the risk of all such negligence charged by him against the defendant.

EASTERING LUMBER COMPANY.
By T. BRADY, JR.,
Attorney.

That the plaintiff objected to the filing of the notice above set forth, but not on the grounds of surprise, and the court sustained said objection and refused to allow said notice under the general issue to be filed or read to the jury to which action of the court, the defendant, Easterling Lumber Company, then and there, and during the trial of the case excepted and still excepts and hereby tenders this, its special bill of exceptions, to the action of the court in refusing the defendant the right to file and read its said plea and notice

which special bill of exceptions is by the court hereby allowed and signed this July 5th, 1912.

W. H. HUGHES,
Judge.

Abstracts of Record, from page 127 to 133.

Here the jury retired from the court room, and the following proceedings were had in the absence of the jury:

> By Mr. Brady: "The defendant in this case now moves the court to allow it, the Easterling Lumber Company, to file special notice under the general issue, amending and enlarging its special notices under the general issue on the subject of the fellow-servant doctrine, plead in a notice and under its general issue before entering into the trial of this case, and setting up contributory negligence and assumptional risk in addition to the fellow-servant doctrine formerly plead."
>
> By Mr. Dent: "We object on the ground: First, that it is filed out of time. Second, because it does not set up any defense under the laws of the State, or of the United States; third, because he has already pleaded contributory negligence; fourth, because the facts set up in said special plea are not applicable to the particular facts developed in this case."

Overruled, plaintiff excepts.

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The counsel for the defendant here reads the motion, as follows:

> "The plaintiff will take notice that the defendant will show by affirmative evidence, and will offer affirmative evidence, to show and tending to show, under its plea of general issue, that the injuries suffered by the plaintiff then and there, occurred through and by the act of a fellow-servant, then and there engaged about the same work, and for which the defendant is not responsible, but whose negligence, if any, was one of the assumed risks taken by the said plaintiff at the time of his employment, and that the statutes of the State of Mississippi, Chapter 194, Acts of 1908, page 204, if applied to the injury in question violates the Federal Constitution in that it is contrary to the Fourteenth Amendment thereof, denying to the defendant the equal protection of the laws; depriving it of its liberty and property, without due process of law, in that under said Constitution of the United States, the said State of Mississippi is wholly without the power to pass an Act which applies to every employee of certain persons without regard to the nature of the employment of such employes, and in that an Act so applying, would vio-

late said Federal Constituion, and that said statutes cannot be severed judicially as so to do would be judicial legislation, and that to impose liability upon the defendant in this cause by reason of said action would be violative of the Federal Constitution.

"And furthermore, that said Act is void because violative of said Constitution, because it deprives defendant of its liberty and property without due process of law, and denies to it the equal protection of the law. That the said plaintiff then and there assumed the risk incident to the running of Engine No. 6, and the Shay Engine; that the said defendant, the Easterling Lumber Company, was not guilty of an actionable negligence, that the said plaintiff was guilty of negligence approximately causing and contributing to his said injury in that he did not at the time of said injury and immediately prior thereto conduct himself as an ordinarily prudent person would, or should have done, and then and there refused for his own safety, and wholly failed and refused to stop his said engine and thereby prevent his injury, and wholly failed to observe the rules of the defendant not to enter upon said "Y" without protecting against said Shay engine, and without waiting for said Shay engine.

"That both of the Easterling Lumber Company's co-defendants are fellow-servants of the plaintiff in this case, and all negligence on their part does not entitle the plaintiff to recover in this case, since plaintiff assumes the risk of all such negligence charged by him against the defendant.

(Signed.) EASTERLING LUMBER COMPANY.
By T. BRADY, JR.,
Attorney.

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By The Court: "The court having heard the plea read, that he defendant desires to interpose at this time, sustains the objection made by the plaintiff to its being filed and read to the jury.

By Mr. Brady: "The defendant excepts to the ruling of the court, for the reason that the matters sought to be proven under notice sought to be filed under the general issue plea, are a defense; and for the reason that the notice sought to be filed is in amendment of a notice formely filed; and the defendant has a right, at any time before the case is submitted to the jury and pending the trial of the case, to amend its plea so as to present to the jury the issue of the csae; and to deny the defendant, the Easterling Lumber Company, this right, is highly prejudicial to its interest, and practically denies it a defense in the case.

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By Mr. Brady: "Now comes the defendant, The Easterling Lumber Company, in this case, and moves the court to exclude the testimony offered by the plaintiff, so far as it is

concerned, and for a peremptory instruction for the defendant, for the reason that the injury suffered by the plaintiff then and there, occurred through and by the act of a fellow-servant, then and there engaged about the same work, and for which the defendant is not responsible, but whose negligence, if any, was one of the assumed risks taken by the said plaintiff at the time of his employment, and that the statutes of the State of Mississippi, Chapter 194, of the Acts of 1908, page 208, if applied to the injury in question, violates the Federal Constitution, in that it is contrary to the Fourteenth Amendment thereof, denying to the defendant the equal protection of the laws, and depriving it of its liberty and property without due process of the law, in that, under said Constitution of the United States, the said State of Mississippi is wholly without the power to pass an Act which applies to every employee of certain persons, without regard to the nature of employment of such employees, and in that an Act so applying would violate said Federal Constitution, and that said statute cannot be severed, judicially, as so to do would be judicial legislation, and that to impose liability upon the defendant in this case by reason said action would be violative of the Federal Constitution.

"And that the statute of the State of Mississippi, Chapter 135, of the Acts of 1910, page 125, if applied to the injury in question, is violative of the Constitution of the United States in that it is contrary to the Fourteenth Amendment thereof, denying to the defendant the equal protection of the laws, depriving it of its liberty and property without due process of law, in that under the said Constitution of the United States, the said State of Mississippi is wholly without power to pass an Act which applies to every employer of certain persons without regard to the nature of the employment of said employees, and is without power to pass such an Act, depriving the courts of the country from passing upon the legal questions involved; that the said Act 135 denies to the defendant, the defense of contributory negligence, although such negligence may have been gross, as was the negligence of the plaintiff in this case, and in so doing violates the Federal Constitution, and deprives the defendant of its liberty and property without due process of law, in that under the Constitution of the United States, the said State of Mississippi is wholly without the power to pass such an Act depriving the courts of the right to pass upon legal questions, and depriving the court of the right to take the case from the jury.

"And, furthermore, that both of said Acts of 1908 and 1910 are void, because violative of the Constitution of the United States, because both of said Acts deprive the defendant of its liberty and property without due process of law, and denies to it the equal protection of the law, and especially is this true of Chapter 194, Acts 1908, page 204.

"That the said plaintiff then and there assumed the risk

incident to the running of Engine No. 6, and the risk incident to the running of the Shay Engine, and that the said defendant, Easterling Lumber Company, was not guilty of any actionable negligence, approximately causing and contributing to his said injury, in that he did not at the time of said injury, and immediately prior thereto, conduct himself as an ordinarily prudent person would, or should have done, and then and there refused for his own safety, and wholly failed and refused to stop his engine and thereby prevent his injury, and wholly failed to observe the rules of the defendant, not to enter upon said "Y" without protecting against said Shay engine and without waiting for said Shay engine; and for the reason that both of the Easterling Lumber Company's co-defendants are fellow-servants, with the plaintiff in this case, and all negligence on their part does not entitle plaintiff to recover in this case, since the plaintiff assumed the risk of all negligence charged against him by defendant, and attempted to prove."

By The Court: "The motion is overruled."

To which ruling the court, the defendant then and there excepted and does still except.

By Mr. Brady: "Now comes the defendant and moves the court to exclude all of the testimony of the plaintiff's witnesses, Burnham and Walker, for the reason that they did not know what the rules of the company were relative to the right-of-way, for the reason they were not even in the employ of the defendant at the time of the accident."

By The Court: "The motion is overruled."

To which ruling of the court the defendant then and there excepted, and does still except.

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## INSTRUCTIONS FOR PLAINTIFF ( Deft. in Error. )

No. 1.

The court instructs the jury for the plaintiff, that if they believe from the evidence that plaintiff was injured by the negligence of the defendants, while he was exercising due care and while he had the right-of-way on track in question, then they should find for him and assess his damages in such sum as all the evidence may show he has sustained, if any, in a sum not to exceed twenty-five thousand dollars.

(Given.)

No. 2.

The court instructs the jury for the plaintiff that if they find for the plaintiff and find that he was exercising due care at the time he received his injuries, if any, then they should assess his damages at such sum as the jury believes from the evidence will fully compensate him for the injury sustained, if any, and the jury should take into consideration the plaintiff's physical and mental suffering, if any; his loss of time while sick and disabled by reason of his injury, if any; his necessary expense, if any, in seeking to be cured, as for medicine, the attention of physicians or other attendants, if any; the permanent injury, if any; to plaintiff's body by reason of his wounds failing to heal or by reason of its not healing so as to restore the body or member thereof or any part of any member thereof to its natural shape or state of health and usefulness; and if the jury believe from the evidence that plaintiff suffered damages in any or all of said ways and the jury find for the plaintiff, holding the defendant's responsible therefor, the jury should award the plaintiff such damages as will fully compensate him. And the jury is not to refuse to fix and assess such damages because the plaintiff may have been unable to state what his damages were, measured in dollars and cents, but the jury are to fix the amount at such sum as they may believe from the evidence, in view of all the evidence, will fully compensate the plaintiff, and return their verdict accordingly, but not to exceed the amount sued for, to-wit: Twenty-five Thousand Dollars.

(Given.)

No. 3.

The court instructs the jury for the plaintiff, that if they find for the plaintiff, their verdict may be in the following form, to-wit: "WE, THE JURY, FIND FOR THE PLAINTIF AND ASSESS HIS DAMAGE AT ..... ($.....) DOLLARS." (The sum to be fixed by the jury.)

(Given.)

No. 4.

The court instructs the jury for the plaintiff that proof of injury inflicted by a corporation or an individual usinging engines and locomotives propelled by the dangerous agency of steam and running on a track, is prima facie evidence of the want of reasonable skill and care on the part of such party operating said engines or locomotives.

Therefore, if the jury believe from the evidence that plaintiff was injured by defendant, Easterling Lumber Company, while running engines and locomotives propelled by steam and running on

tracks, then the burden of proof is on defendant, Easterling Lumber Company, to prove by a preponderance of the credible evidence, that it was not guilty of negligence in the infliction of such injury, if any, was inflicted.

(Given.)

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## INSTRUCTIONS GIVEN FOR DEFENDANTS.
### (Plaintiffs in Error.)

No. 9.

The court instructs the jury for the defendant that if they believe from the evidence in this case that he plaintiff knew the Shay engine had the right-of-way over the "Y" when the empties were on the "Y," and with such knowledge, without attempting to see or ascertain whether the empties were on the "Y," entered upon the "Y," thereby causing the collision and his injury then plaintiff cannot recover.

(Given.)

No. 10.

The court instructs the jury for the defendant that the burden of proof in this case is upon plaintiff and he must show by a preponderance of the evidence that his injury was caused by the negligence of defendant and not by his own negligence and unless the plaintiff so shows, then he cannot recover.

(Given.)

No. 11.

The court instruct the jury for the defendant, that in determining whether the defendant was or was not guilty of negligence, causing the injury to the plaintiff, they will not consider the seriousness and painfulness of his injury. That the seriousness and painfulness of his injury can be considered only for the purpose of fixing the amount of damages plaintiff sustained and before he can recover at all, it must be determined that the defendant was negligent and that its negligence was the proximate cause of the injury, and in determining whether there was negligence on the part of the defendant contributing proximately to the plaintiff's injury, sympathy for plaintiff and all pain and suffering endured by the plaintiff should not enter into the deliberations.

(Given.)

No. 12.

The court instruct the jury, that there can be no recovery in this case unless they believe the engine number six had the right-of-

way across the "Y," and unless the plaintiff shows by a preponderance of the testimony that the engine number six, which he was running, had the right-of-way over the "Y" on Monday morning, then there can be no recovery, even they may believe the defendant negligent in allowing the Shay engine to be run by John Tatum.

(Given.)

No. 13.

The court instructs the jury for the defendant that if they believe from the testimony in the case that the plaintiff was thoroughly acquainted with the rules under which defendant's trains were operated and knew or by the exercise of ordinary care might have known that the Shay engine of the defendant was due to go after the empty cars on Monday mornings, and with such knowledge entered upon the "Y," then he assumed the risk by so doing, and cannot recover.

(Given.)

No. 14.

The court instruct the jury, that although they may believe from the evidence that the defendant was negligent and that its negligence contributed to plaintiff's injury; still if they further believe that the plaintiff was negligent and his negligence also contributed to his injury, then in assessing damages for plaintiff they must reduce the damages which he sustained in proportion to the negligence of which he was guilty.

(Given.)

No. 15.

The court instructs the jury for the defendant that they must in their deliberations disregard everything that they may have heard or seen during the trial of this case except the evidence submitted to them, and the rulings of the court; and that they must lay aside in their deliberations conjectures, suppositions, and every other outside influence which may have a tendency to influence them, and look solely and wholly to the credible evidence and the law in reaching their verdict, and unless they believe from a preponderance of the credible evidence that plaintiff's injury was caused by the proximate negligence of the defendant, the plaintiff cannot recover.

(Given.)

No. 16.

The court instruct the jury that under the law, the plaintiff cannot recover, though even so permanently and painfully injured, unless his injury was caused by the negligent act of the defendant,

and that the burden of proof in this case is upon the plaintiff to show by a preponderance of the evidence that his injury was not caused by his own negligence, but was caused by the negligence of the defendant.

(Given.)

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## INSTRUCTIONS REFUSED DEFENDANTS.

### (Plaintiffs in Error.)

No. 1.

The court instructs the jury, that if they believe, from all the evidence in the case, that injury to plaintiff was caused by the negligence of a fellow servant of plaintiff, then the plaintiff cannot recover.

(Refused.)

No. 2.

The court instructs the jury to find a verdict for the defendant.

(Refused.)

No. 3.

The court instructs the jury for the defendant that, although they may believe from the evidence in this case, that the defendant was negligent; still if they further believe from the evidence that the plaintiff's injury was caused by his own gross negligence in violating a rule of the company, then the plaintiff cannot recover, even though the defendant, Easterling Lumber Company, may not have been free from negligence.

(Refused.)

No. 4.

The court instructs the jury for the defendant, that if they believe from the evidence in this case, that the injury to plaintiff was caused by the negligent act of an engineer on the Shay engine, failing to obey an order to run his engine to the "Y" before six o'clock and the negligence of John Tatum in not leaving the camp on time and in failing to give engine six the right-of-way before six o'clock, then his injury was caused by the negligence of a fellow-servant and he cannot recover.

(Refused.)

No. 5.

The court instructs the jury for the defendant that if they believe from the evidence in this case that the plaintiff was guilty of

contributory negligence, and that his contributory negligence was the proximate cause of his injury, then he cannot recover.

(Refused.)

No. 6.

The court instructs the jury for the defendant that if they believe from the evidence in the case that the injury of the plaintiff was caused by the negligent act of an engineer in failing to obey orders properly given by his superior, then plaintiff's injuries were caused by a fellow-servant and he cannot recover.

(Refused.)

No. 7.

The court instruct the jury, that if even they may believe from the evidence in this case the defendant or its agents were negligent, still if they further believe from the evidence that the plaintiff, while running the Shay engine allowed his fireman to run the Shay engine to the "Y" for empties and that he took charge of the Shay at the "Y" and ran it into the camp on Monday morning and while running engine six, knew that he should stop his engine before entering the "Y" when the empty cars were on the "Y" but notwithstanding such knowledge ran his engine on the "Y" while cars were on the "Y," on the Monday morning the wreck occurred, then the plaintiff cannot recover.

(Refused.)

No. 8.

The court instructs the jury that the defendant Tatum had no right to change defendant's order giving the Shay the right-of-way and plaintiff cannot recover against the Easterling Lumber Company on account of an injury sustained by plaintiff, caused by the right-of-way order being changed by Tatum even they believe he made such a change.

(Refused.)

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## VERDICT OF THE JURY.

We, the jury, find for the plaintiff and assess his damages at Seventeen Thousand Five Hundred Dollars ($17,500.00.)

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(Title of Cause.)

## JUDGMENT CIRCUIT COURT.

This day this cause coming on to be heard, in open court, all parties announcing ready for trial, and issue being joined between

them, thereupon came a jury of good and lawful men, to-wit: T. B. Holcomb, and eleven others, who being elected, empaneled and sworn a true verdict to give according to the evidence, and having heard the evidence and the arguments of counsel and received the instructions of the court retired to consider of their verdict, presently returned into open court the following verdict, to-wit: "We, the jury, find for the plaintiff and assess his damages at SEVENTEEN THOUSAND AND FIVE HUNDRED DOLLARS ($17,500.00.)

It is therefore ordered and considered by the court, that the plaintiff, S. W. Pierce, do have and recover of and from the defendant, the Easterling Lumber Company, a corporation, Will (W. W.) Tatum and John Tatum, defendants, said sum of SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS ($17,500.00), and all costs in this behalf expended, for which let execution issue.

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(Title of Cause.)

## MOTION FOR A NEW TRIAL.

Now comes the defendants in the above styled case and moves the court to set aside and vacate the judgment of the court and the verdict of the jury rendered in said cause and grant them a new trial therein for the following causes, to-wit:

Fifth. The court erred in granting to plaintiff instructions marked given, numbered: 1, 2, 3 and 4.

Sixth. The court erred in refusing and marking refused the instructions asked by the defendants, numbered as follows: 1, 2, 3, 4, 5, 6, 7 and 8.

Seventh. The court erred in refusing to allow the defendants to amend their plea filed after plaintiff had rested and before defendants introduced any evidence.

Eighth. The court erred in refusing to grant the defendants the peremptory instruction which they sought, as shown by the stenographer's notes.

Tenth. The court erred in admitting the testimony tending to show and showing the negligence on the part of John Tatum, Claude Warren and Will Tatum, because they were fellow-servants of the plaintiff, since Chapter 194, Acts of 1908, page 204 is unconstitutional and void for the reasons fully set out in the stenographer's notes, and for the reasons fully set out in the defendant's special bill of exceptions.

Eleventh. The court erred in refusing to allow the defendant, Easterling Lumber Company, to amend its plea by giving additional

and amended notice under the general issue, after the plaintiff rested but before defendants offered evidence, the nature of which additional and amended plea and notice under the general issue is fully set forth in defendant, Easterling Lumber Company's special bill of exceptions filed and allowed by the court.

Twelfth. The court erred in granting to plaintiff an instruction, under Chapter 215, of the laws of 1912, whereby the burden of proof was, by said instruction, placed upon defendant, Easterling Lumber Company, the jury being instructed thereby that the injuries sustained by plaintiff was prima facie evidence of want of reasonable skill and care on the part of the defendant, Easterling Lumber Company.

Eighteenth. That by reason of the argument made by the plaintiff's attorney, R. L. Dent, the defendant did not receive a fair trial, said argument being made upon an instruction which reads as follows:

> "The court instructs the jury for the plaintiff that proof of injury inflicted by a corporation or an individual using engines and locomtives propelled by the dangerous agency of steam and running on a track, is prima facie evidence of the want of reasonable skill and care on the part of such party operating said engines or locomotives. Therefore, if the jury believe from the evidence that the plaintiff was injured by defendant, Easterling Lumber Company, while running engines and locomotives propelled by steam and running on tracks, then the burden of proof is on the defendant, Easterling Lumber Company, to prove by preponderance of the credible evidence that it was not guilty of negligence in the infliction of such injury, if any, was inflicted."

And the jury was told by the said R. L. Dent that the burden of proof was upon the defendant, notwithstanding the instructions read by the defendant's attorney. The law upon which said instruction is based is unconstitutional and void and in violation of the Fourteenth Amendment to the Constitution of the United States, and deprives the defendant of property without due process of law. That said statute was enacted long after the accident occured causing the injury to the plaintiff, and the instruction granted upon said law deprived the defendant of property without due process of law, and said instruction placing the burden of proof upon the defendant made it utterly impossible for the defendant to secure a fair trial and obtain a verdict at the hands of a jury.

EASTERLING LUMBER COMPANY.
By J. J. STUBBS and T. BRADY, JR.

(Title of Cause.)

## ORDER OVERRULING MOTION FOR NEW TRIAL.

This cause came on to be heard upon defendant's motion for a new trial and on defendant's supplemental motion for a new trial, and all evidence being heard, it is the judgment of the court that the said motion for a new trial and the said supplemental motion for a new trial should be overruled. The said motion for a new trial and said supplemental motion for a new trial are hereby overruled and the defendant is denied a new trial in this cause.

Done this the 19th day of July, A. D., 1912.

To which ruling of the court there defendants there excepted.

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## ACT 1908, Chapter 194, Page 204, Et Seq.

*AN ACT to amend Section 4056 of the Code of 1906, so as to abolish the Fellow-servant Rule in Actions for Injuries to Employes of Railroads and Others Using Engines, Locomotives, Cars, etc., Propelled by the Dangerous Agencies of Steam, Electricity, Gas, etc.*

Be it enacted by the Legislature of the State of Mississippi, That Section 4056 of the Code of 1906, be, and the same is hereby, amended so as to read as follows:

Fellow-servant rule abolished as to actions by railroad employes, etc.

SECTION 1. Every employee of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description watsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, shall have the same rights and remedies for an injury suffered by him from the act or omission of such railroad corporation or others, or their employes, as are allowed by law to other persons not employed.

Knowledge by any employe injured of the defective or unsafe character or condition of any machinery, ways or appliances, or of the improper loading of cars, shall not be a defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. When death ensues from an injury to an employe, an action may be brought in the name of the widow of such employee for the death of the husband, or by the husband for the death of his wife, or by a parent for the death of a child, or in the name of a child for the

death of an only parent, for such damage as may be suffered by them, respectively, by reason of such death, the damages to be for the use of such widow, husband, parent or child, except that in case the widow should have children, the damages shall be distributed as personal property of the husband. The legal or personal respresentatives of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. In every such action the jury may give such damages as shall be fair and just, with reference to the injury resulting from such death to the person suing. Any contract or agreement expressed or implied, made by an employee to waive the benefit of this Section shall be null and void; and this Section shall not deprive an employee of a person, natural or artificial, or the legal or personal representatives of such person, of any right or remedy they now have by law.

SEC. 2. That this Act shall take effect and be in force from and after its passage.

Approved March 20, 1908.

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## SECTION 1985 MISSISSIPPI CODE 1906.

1985 (1808.) Injury to persons or property by railroads prima facie evidence of want of skill etc. In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in refernce to such injury. This section shall also apply to passengers and employes of railroad companies.

Code 1906, page 618.

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## ACTS 1912, Chapter 215, Page 290 ( Laws of Mississippi. )

*AN ACT to Amend Section 1985 of the Mississippi Code of 1906, so as to Provide that Proof of Injury Inflicted by the Running of Engines, Locomotives or Cars of Railroad Corporations and of all other Corporations, Companies, Partnerships and Individuals, Using Engines, Locomotives or Cars of any Kind or Descriptions Whatsoever Propelled by the Dangerous Agencies of Steam, Electricity, Gas, Gasoline or Lever Power, and Running on Tracks, Shall be Prima Facie Evidence of the Want of Reasonable Skill and Care of such Railroad Corporations and such other Corporations, Companies, Partnerships, and Individuals in Reference to Such Injury.*

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That Section 1985 of the Mississippi Code of 1906 be, and the same is hereby amended so as to read as follows:

1985 (1808.) Injury to persons or property by railroads prima facie evidence of want of reasonable skill and care, etc. In all actions against railroad corporations and all other corporations, companies, partnerships and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives, or cars of any such railroad corporations or such other corporation, company, partnership or individual shall be prima facie evidence of the want of reasonable skill and care of such railroad corporation, or such other corporation, company, partnership or individual in reference to such injury. This Section shall also apply to passengers and employes of railroad corporations and of such other corporations, companies, partnerships and individuals.

SEC. 2. That this Act shall take effect and be in force from and after its passage.

Approved March 6, 1912.

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## ASSIGNMENT OF ERRORS SUPREME COURT OF MISSISSIPPI.

STATE OF MISSISSIPPI,
COUNTY OF HINDS.
SECOND DISTRICT.

} IN THE SUPREME COURT,
AT THE OCTOBER TERM, 1912.

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EASTERLING LUMBER COMPANY, *Appellant.*

*vs.*

S. W. PIERCE, *Appellee.*

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Comes the Appellant herein and for error assigns as *follows*, to-wit:

The Court below erred:

5. The court erred in granting to plaintiff instructions marked given, numbered 1, 2, 3 and 4.

6. The court erred in refusing and marking refused the instructions asked by the defendants, numbered as follows: 1, 2, 3, 4, 5, 6, 7 and 8.

7. The court erred in refusing to allow the defendants to amend their plea filed after plaintiff had rested and before defendants introduced any evidence.

8. The court erred in refusing to grant the defendants the peremptory instruction which they sought, as shown by the stenographer's notes.

10. The court erred in admitting the testimony tending to show and showing the negligence on the part of John Tatum, Claud Warren and Will Tatum, because they were fellow-servants of the plaintiff, since Chapter 194, Acts of 1908, page 204, is unconstitutional and void for the reasons fully set out in the stenographer's notes, and for the reasons fully set out in the defendant's special bill of exceptions.

11. The court erred in refusing to allow the defendant, Easterling Lumber Company, to amend its plea by giving additonal and amended notice under the general issue, after the plaintiff rested, but before defendants offered evidence, the nature of which additional and amended plea and notice under the general issue, is fully set forth in defendant, Easterling Lumber Company's special bill of exceptions filed and allowed by the court.

12. The court erred in granting to the plaintiff an instruction, under Chapter 315, of laws of 1912, whereby the burden of proof was, by said instruction, placed upon the defendant, Easterling Lumber Company, the jury being instructed thereby that the injuries sustained by plaintiff was prima facie evidence of want of reasonable skill and care on the part of the defendant, Easterling Lumber Company.

15. The court erred in overruling the motion for a new trial.

Respectfully submitted,

MAYES & MAYES,
Attorneys for Appellant.

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Appeal from Circuit Court, Covington County; W. H. Hughes, judge.

Action by S. W. Pierce against the Easterling Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

## OPINION AND FINDINGS OF SUPREME COURT OF MISSISSIPPI. (64 So. 461).

REED, J. Appellee obtained judgment against appellant in the sum of $17,500.00 for damages from personal injury. At the time he was injured, he was employed by the appellant company as an engineer in charge of an engine which was engaged in pulling a train carrying employes of appellant company from its mill at Ora to its camp in the woods over its logging railway, a distance of about 15 miles. The injury resulted from a head-on collision between the engine which was in charge of appellee and an engine known as the "Shay," pulling cars from the camp. Appellee charged that the collision was from negligence of several employes of appellant company. This negligence included the placing of an incompetent engineer in charge of the Shay and the failure to give proper orders as to the proper running of the trains, which resulted in their unexpected meeting. Appellee's injury was serious, and resulted in the loss of a leg.

Appellant assigns as error the refusal by the court to give instructions to the effect that if the jury believed from the evidence in the case that the injury to appellee was caused by the negligence of a fellow-servant, then appellee could not recover. Counsel for appellant in their brief make this assignment of error in the following words:

> "The court erred in denying the appellant the defense that the jury of appellee was caused by the negligence of a fellow-servant."

[1, 2.] This brings to our consideration the law of Mississippi abolishing the fellow-servant rule among certain employes.

It is asserted by appellant that Chapter 194 of the Acts of 1908 is unconstitutional for two reason: "(1.) It violates Section 193 of the Mississippi Constitution. (2.) It violates the equality clause of the Fourteenth Amendment to the Constitution of the United States."

The title to Chapter 194 of the Acts of 1908 shows it to be An Act to amend Section 4056 of the Code of 1906, so as to abolish the fellow-servant rule in actions for injuries to employes of railroads and other corporations using engines, etc., propelled by the dangerous agencies of steam, electricity, etc.

We quote the First Section of the Chapter:

"Every employee of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, shall have the same rights and remedies for an injury suffered by him from the act or omission of such railroad corporation or others, or their employes, as are allowed by law to other persons not employed.

"Knowledge by any employee injured of the defective or unsafe character or condition of any machinery ways or appliances, or of the improper loading of cars, shall not be a defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. When death ensues from an injury to an employee, an action may be brought in the name of the widow of such employee for the death of the husband, or by the husband for the death of his wife, or by a parent for the death of a child, or in the name of a child for the death of an only parent, for such damage as may be suffered by them, respectively, by reason of such death, the damages to be for the use of such widow, husband, parent or child, except that incase the widow should have children, the damages shall be distributed as personal property of the husband. The legal or personal representatives of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. In every such action the jury may give such damages as shall be fair and just, with reference to the injury resulting from such death to the person suing. Any contract or agreement expressed or implied, made by an employee to waive the benefit of this section shall be null and void, and this section shall not deprive an employee of a person, natural or artificial, or the legal or personal representatives of such persons, of any right or remedy they now have by law."

Section 193 of the Mississippi Constitution reads:

"Every employee of any railroad corporation shall have the same right and remedies for any injury suffered by him from the act or omission of said corporation or its employes, as are alowed by law to other persons not employes where the injury results from the negligence of a superior agent or officer, or of a person having the right to control, or direct the services of the party injured, and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work. Knowledge by any employee injured, of the defective or unsafe character or condition of any machinery, ways or

> appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them. Where death ensues from any injury to employes, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreemnt, express or implied, made by any employee to waive the benefit of this section shall be null and void; and this section shall not be construde to deprive any employee of a corporation or his legal or personal representative, of any right or remedy that he now has by the law of the land. The Legislature may extend the remedies herein provided for to any other class of employes."

Section 193 of the Constitution of 1890 has been upheld as not violative of the Constutition of the United States.

It has been held that Section 193 applies only to railroad corporations engaged in the business of common carrier, or those denominated "commercial railroad companies," and that it does not apply to railroads owned and operated as an adjunct to the main business of their owners, such as construction company roads, roads used in connection with mines and lumber corporations and logging roads. Construction Co. vs. Heflin, 88 Miss. 314, 42 South. 174. The railroad in the case at bar is a logging road.

It will be noticed that the final sentence of Section 193 provides for the extension of the remedies therein in the following language:

> "The Legislature may extend the remedies herein provided for to any other class of employes."

It is not argued by counsel for appellant that the Legislature could not extend the remedies to employes of logging roads. It is conceded that this may be done. It is claimed that the words were at once a grant and a limitation; that by necessary inference the limitation amounted to a denial to the Legislature of a power to grant any remedies curtailing the fellow-servant rule other than those provided in the section. It is true that by the statute (Chapter 194 of the Acts of 1908), there is a broader and fuller statement of the abrogation of the fellow-servant rule than that contained in the section of the Constitution. The makers of the Constitution, by Section 193, provided for the abrogation of the fellow-servant doctrine to a certain extent.

It was said by Chief Justice Whitfield in the case of Ballard vs. Oil Co., 81 Miss. 507, 34 South. 533, 62 L. R. A. 407, 95 Am. St. Rep. 476, that it was the purpose of the framers of the Constitution

to authorize legislation to abolish the fellow-servant rule in the case of railroad corporations whose business was known to be inherently dangerous insofar as such litigation would be in accord with the principles announced by the decisions of the United States Supreme Court. He further stated in his opinion in that case that "the purpose of the last clause of Section 193 was to extend the remedies therein provided for to any other class of employes of corporations or persons whose business was, like that of railroads, inherently dangerous, or whose business was so different from the business of other corporations or persons as to furnish the basis for a classification of the business of such corporations, or persons, under which their employes might be permitted to sue without reference to the fellow-servant rule, while the employes of corporations, or persons, not having that sort of business, could not so sue; in other words, to permit a classification based on 'some difference bearing a reasonable and just relation to the act in respect to which the classification is proposed.' * * * It is not therefore to be supposed that the last clause of the section meant any more than that there might be other classifications of the employes of corporations or individual persons based also on some distinguishing difference in the nature of the business."

After making the provision referred to and treating the subject in hand, the Constitution framers added at the end, and from its appearance, as an afterthought, the final sentence:

> "The Legislature may extend the remedies herein provided for to any other class of employes."

It will be noticed that the Legislature is not enjoined to extend such remedies. The statement carries with it the thought that it was made as a suggestion to the Legislature to enact laws for the purpose of abolishing the fellow-servant rule in other classes of employes. We cannot believe from an entire consideration of the section, and in view of its evident purpose, that the final sentence was intended as a restriction. In truth, we do not see that it is necessary to regard it as a grant in order that the Legislature should be able to enact a statute to abolish the fellow-servant rule in proper classes of employes. The Legislature is entrusted with the general authority to make laws at discretion, unless there is a clear constitutional prohibition. Judge Cooley, in his Consitutional Limitations, p. 87, says:

> "In the enactment of laws the Legislature must act upon its own reasons; mixed motives of power, justice, and policy

> influence its action; and it is always justifiable and laudable to lean against a violation of the Constitution."

In the case of Hart vs. State, 87 Miss. 171, 39 South. 523, 112 Am. St. Rep. 437, it is stated by Judge Truly, in delivering the opinion of the court, that:

> "It is the universally accepted rule of statutory construction that no Act of the Legislature will be condemned as violative of or repugnant to the fundamental law unless it manifestly be in palpable conflict with some plain provision of the State or Federal Constitution; and, as such conflict is not to be implied, it is the duty of the court, whenever possible, to give every expression of legislative will such construction as will enable the statute to have effect."

In Burnham vs. Sumner, 50 Miss. 517, Chief Justice Peyton said:

> "Whenever an Act of the Legislature can be so construed and applied as to avoid conflict with the Constitution and give it the force of law, such construction will be adopted by the courts. An inquiry into the validity of an Act on the ground that it is unconsitutional is an inquiry whether the will of the representative as expressed in the law is or is not in conflict with the will of the people as expressed in the Constitution. And unless it be clear that the Legislature has transcended its authority, the courts will not interefere. Acts of the Legislature constitutionally organized are presumed to be constutional, and it is only where they manifestly infringe some of the provisions of the Constitution or violate the rights of the citizen that their operation and effect can be impeded by the judicial power."

In Railroad vs. Crawford, 99 Miss. 697, 55 South. 596, it was held that:

> "All doubts are resolved in favor of the constitutionality of a statute; if there is any reasonable doubt of its constitutionality, it must be upheld by the court."

It is well settled in this State that it is the duty of the court to construe Acts of the Legislature so as to uphold their constitutionality and validity, if such can be reasonably done, and any doubts relative thereto will be resolved in favor of the law. All presumptions are in favor of the constitutionality of the act because the Legislature, before passing the law, is required to consider the same, and, before acting upon it, determine as to its constitutionality.

However, we note that statutes abolishing the fellow-servant doctrine as to railroads and other proper classes of employes have

been held by the Supreme Court of the United States as constitutional. Tullis vs. Lake Erie W. R. Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; Minn. Iron Co. vs. Kline, 199 U. S. 593, 26 Sup. Ct. 159, 50 L. Ed. 322.

So the Legislature of Mississippi, without any provision in the State Constitution, such as Section 193, could have enacted a law abrogating the fellow-servant rule in a class composed of railroad employes and such other proper classes. Section 193 is, in itself, only the enactment of a law on the subject of the fellow-servant doctrine. We do not see in it any purpose to prohibit the Legislature from enacting statutes on the same subject. Such laws are reasonable in their effect. When applied to proper classifications they have repeatedly upheld by courts.

We conclude that there is no limitation in the Constitution of Mississippi on the power of the Legislature to enact laws abolishing the fellow-servant rule in proper classes. The final sentence in Section 193 of the Constitution is not a limitation which denied to the Legislature the power to pass the act. Chapter 194 of the Laws of 1908.

[3.] Now as to the contention that Chapter 194 violates the equality clause of the Fourteenth Amendment of the Constitution of the United States: Counsel for appellant contend that this violation is accomplished by the inclusion of the words "and running on tracks." We cannot agree with counsel that this is so. It has been held that Section 193 of the Constitution excludes all railroads except commercial railroads, or those engaged in the business of common carrier. We see in the act of the Legislature the purpose to extend the remedy provided by the abrogation of the fellow-servant doctrine to all employes of all railroad corporations, including the commercial railroads, and including also all other railroads, such as logging railroads and those connected with lumber and other enterprises using such engines, locomotives, and cars "running on tracks." We understand the words "runing on tracks" to define such engines, locomotives, and cars propelled by the several dangerous agencies named as are used in all of the different kinds of railways. The statute was meant in its broad expression to exclude no kind of railways in Mississippi. The statute provides that the remedies extend to all employes using engines, locomotives, or cars owned and operated by railroad corporations and all other corporations and individuals. In short, the class made by the statute is all employes using such engines, locomotives, and cars of all kinds and descriptions propelled by the dangerous agencies specified and running on tracks, that is, on a defined way such as used by railroads. We deem

this a reasonable classification which applies equally to all in the same situation.

In the case of Aluminum Co. vs. Ramsey, 222 U. S. 251, 32 Sup. Ct. 76, 56 L. Ed. 185, the constitutionality of a statute in Arkansas abolishing the fellow-servant rule as to corporations operating railroads in that State was upheld. The court, speaking through Justice McKenna, said:

> "The statute constitutes a class of corporations operating railroads, and under the cases we have cited the classification is valid, there being equality with the class."

We find the Arkansas statute as broad in its terms as the Mississippi statute now under consideration. This statute abolished the doctrine of common employement as regards railroad companies, all corporations of every kind, and every company, whether incorporated or not, engaged in the mining of coal.

The Supreme Court of Florida, in passing upon an Act in that State, which provides that the facts that the injured person is an employee of a railroad company, and damages were caused by negligence of another employee, shall be no bar to recovery, and in upholding the statute as constitutional against the objection of inequality, decided that "it is within the province of the Legislature to modify the common-law rules regulating employers' liability, and a wide discretion is accorded it in determining the subjects as well as the character and extent of regulations designed to promote the general welfare; the limitations imposed by the Federal Constitution being designed merely to prevent arbitrary uses of State authority." Taylor vs. Prairie Pebble Phosphate Co. (1911) 61 Fla. 455, 54 South. 904.

Chief Justice White, in delivering the opinion of the court, in the case of Railroad Co. vs. Melton, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921, said:

> "That the Fourteenth Amendment was not intended to and does not strip the States of the power to exert their lawful police authority is settled, and requires no reference to authorities. And it is equally settled—as we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority, therefore that clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasion. That is to say, as the power to classify is not taken away by the operation of the equal protection of the law clause, a wide scope of legisla-

> tive discretion may be exerted in classifying without conflicting with the constitutional prohibiton. It is beyond doubt foreclosed that the Indiana statute does not offend against the equal protection clause of the Fourteenth Amendment, because it subjects railroad employes to a different rule as to the doctrine of fellow-servant from that which prevails as to other employments in that State." (Citing Tullis vs. Lake Erie W. R. Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; Pittsburg, C., C. & St. L. R. Co. vs. Ross, 212 U. S. 560, 29 Sup. Ct. 688, 53 L. Ed. 652.)

Where there are reasonable reasons for doing so certain industries or classes of persons may be selected out for special regulation, or for the enjoyment of special privileges. Willoughby on the Constitution, Section 484.

The beneficent provisions of the Fourteenth Amendment can hardly secure for all persons in this nation the same remedies and the benefits of the same laws. It is enough if such are secured for all those in a class reasonably and properly made.

Peculiar duties, services, and risks rest upon the employes of the corporations and individuals named in the statute. Their wants and conditions, in the employment, are alike. They are properly classified.

We fully appreciate the force of the argument made by counsel for appellant that employes at work upon traction engines or motor cars not running on tracks should be included. It may be that in the future, when we have new, solid, and stable highways throughout the rural districts, and when the streets in the towns are all paved, that traction engines and motor cars shall be so generally used as to justify the formation of a class to receive the benefits from the abrogation by the Legislature of the felow-servant rule. At present, and under conditions now existing, we cannot see that the prospect of the advisability at some time in the future for such classification can in any manner interfere to declare unreasonable and unequal the formation of the present class for the benefits of such provision.

It is clear to us that Chapter 194 of the Act of 1908 makes a reasonable and sufficient classification, and is not repugnant to the equality clause of the Fourteenth Amendment.

[4.] It is further assigned as error that "the court erred in instructing the jury that if the appellee was injured by running an engine or locomotive, the burden of proof was upon appellant to prove, by a preponderance of the credible evidence, that its negligence did not cause the injury to appellee." This calls in question the operation of the provisions of Chapter 215 of the Laws of 1912

that in all actions against railroad corporations, etc., the proof of injury inflicted by the running of engines, locomotives, or cars shall be prima facie evidence of the want of reasonable skill and care, etc. Appellee was injured on October 16, 1911, before the prima facie statute (Chapter 215) was enacted. Appellant contends that because the law was passed after the injury, it should not apply in the trial of the case. The law was in effect at the time the case was tried in July, 1912. We understand statutes like Chapter 215 provide a rule of evidence. Touching the question of the retrospective construction of statutes under the subject of Statutes Relating to Remedy and Procedure, we find in 36 Cyc., p. 1213, the following statement of the law:

> "The presumption against the retrospective construction of statute is founded on the principle that they should not be given such a construction as will make them unconstitutional or unjust, and therefore, as a general rule, does not apply to statutes that relate merely to remedies and modes of procedure."

In 36 Cyc. p., p. 1217, is the following:

> "Rules of evidence are at all times subject to modification by the Legislature and statutes, making such changes as are applicable from their passage, not only to causes of action arising therafter, but also to actions accrued or pending at the time."

It was decided in Carothers vs. Hurley, 41 Miss. 71, that:

> "The Legislature has the power to change the rules of evidence, and to adopt new rules, so as to affect past and future rights of action."

In Belcher vs. Mhoon, 47 Miss. 613, it was decided that:

> "It is competent for the Legislature to enact laws in respect to testimony, and to shift the burden of proof by pronouncing that, if certain facts exist, the presumption shall be that certain other things connected with them were done."

The statute in the case at bar dealt only with the rule of evidence, and not with a substantive right. The court did not err in granting the instruction.

[5.] We note and have carefully considered the argument by counsel for appellant that the court erred in refusing to vacate and set aside the judgment rendered against appellant because the jury

had received information that appellant's attorney had offered appellee's attorney a certain sum in settlement of the case, and we note the testimony taken upon the motion for new trial. A jury should be kept free from all outside influence, and the trial judge should use due care to see that this is accomplished. In this case, however, we cannot see that the judge erred in refusing to grant a new trial under the facts presented to him. He stated in overruling the motion for a new trial that the testimony failed " to show that any of the jurors are corrupted or influenced by any outside influence whatever." It is not shown that any corrupt means were used in conveying such information to the jury.

[6.] We cannot say that the verdict in this case is excessive. At the time he was injured appellee was 29 years old, in strong health, and earning $75 per month. His foot and akle were crushed, and bones in his leg were broken. He suffered great pain, and was under treatment for about five months before his leg was amputated. He is permanently injured. It was the province of the jury to determine the amount of his damage from his suffered and permanent disability. While the verdict may seem large, still we cannot see, on the facts as presented in this case, that it is not warranted.

We do not find any reversible error in this case.

Affirmed.

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(Title of Cause.)

## JUDGMENT SUPREME COURT OF MISSISSIPPI.

WHEREAS, on the 23rd day of February, 1914, the same being a day of the regular term of our SUPREME COURT, begun and held in the Court Room, in the Capitol, in the City of Jackson, in said State, on the 1st Monday of March, in the year of our Lord, 1914, the following final judgment was rendered by our SUPREME COURT, to-wit:

EASTERLING LUMBER COMPANY

No. 16,274.

*vs.*

S. W. PIERCE.

This cause having been submitted on a former day of this term, record herein, from the Circuit Court of Covington County, and this court having sufficiently examined and considered the same, and being of opinion that there is no error therein, doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the July Term thereof, A. D., 1912, on the 5th day of July, 1912,

be and the same is hereby affirmed. And that the appellee do have and do recover of the Appellant and O. L. Benway and T. R. Thames, sureties in the supersedeas bond, the sum of Seventeen Thousand Five Hundred ($17,500.00) Dollars, the amount of the judgment in the court below, together with the further sum of Eight hundred and Seventy-five ($875.00) Dollars, being damages of the rate of five per centum, as allowed by law, as well as interest on the amount of said judgment from date of rendition till paid, at the rate of 6 per centum per annum; and also the costs of this cause in this court and in the court below, to be taxed, etc.

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## MOTION FOR WRIT OF ERROR IN SUPREME COURT OF MISSISSIPPI.

STATE OF MISSISSIPPI, } **IN THE SUPREME COURT,**
COUNTY OF HINDS. } TO THE MARCH TERM, 1914.

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EASTERLING LUMBER COMPANY, et als., *Plaintiffs in Error.*

*vs.*

S. W. PIERCE, *Defendant in Error.*

---

The Easterling Lumber Company and O. L. Benway and T. R. Thames, plaintiffs in error, in the above styled cause, feeling themselves aggrieved at the judgment rendered on the second day of March, 1914, in favor of S. W. Pierce, defendant in error, come now by Edward Mayes, their attorney, and petition this court for an order allowing the plaintiff in error to prosecute a writ of error to the Honorable, the Supreme Court of the United States of America, under and according to the laws of the United States of America, in that behalf made and provided; and, also, that an order be made, fixing the amount of security which shall be given upon the writ of error, and that upon the giving of such security, all further proceedings in this case be suspended and delayed upon the determination of the writ of error by the Supreme Court of the United States of America.

And your petitioner will ever pray.

T. BRADY, JR. and EDWARD MAYES,
Attorneys for Plaintiff in Error.

STATE OF MISSISSIPPI, } **IN THE SUPREME COURT,**
COUNTY OF HINDS. } TO THE MARCH TERM, 1914.

EASTERLING LUMBER COMPANY, et als., *Plaintiffs in Error.*

*vs.*

S. W. PIERCE, *Defendant in Error.*

At a stated term, to-wit: The March Term, 1914, of the Supreme Court of the State of Mississippi, present the Honorable Sidney Smith, Chief Justice, and the Honorable Samuel C. Cook and Richard F. Reed, Associate Justices:

Upon motion of Edward Mayes, attorney for the Easterling Lumber Company, and for O. L. Benway, and T. R. Thames, upon filing the petition for writ of error and assignment of error, the order that a writ of error be, and is hereby allowed to them for review in the Supreme Court of the United States in the judgment heretofore rendered; and that the amount of bond on the said writ of error shall be filed at Forty Thousand Five Hundred Dollars ($40,500.00); which, when approved, the said writ of error shall operate as a supersedeas.

SIDNEY SMITH,
Chief Justice.

## APPEAL BOND AND WAIVER OF SERVICE OF CITATION IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF MISSISSIPPI, } **IN THE SUPREME COURT,**
COUNTY OF HINDS, } TO THE MARCH TERM, 1914.

Know all men by these presents, that we, the Easterling Lumber Company, and O. L. Benway, and T. R. Thames, as principals, and Brookhaven Bank & Trust Co., Z. D. Davis and W. D. Davis, as sureties, are held and firmly bound unto S. W. Pierce, in the full and just sum of $40,500.00, to be paid to the said S. W. Pierce, his heirs, executors, administrators, or assigns, for which payment, well and truly to be made, we do hereby bind ourselves, our heirs, executors, adinistrators and successors, jointly and severally, firmly by these presents.

Witness our signature, this the 14th day of July, A. D., 1914.

WHEREAS, lately, at a session of the Supreme Court of the State of Mississippi, in a suit pending in said Supreme Court between the said S. W. Pierce, as appellee, and the said Easterling Lumber Company, as appellants, a final judgment was rendered by the said Supreme Court of the State of Missisippi on the second day of March, 1914, against the said Easterling Lumber Company, appellant, and its sureties, the said O. L. Benway and T. R. Thames, and the said Easterling Lumber Company, and said sureties, Benway and Thames, obtained from said Supreme Court at writ of error to the Supreme Court of the United States, to reverse the judgment aforesaid, in said suit, and a citation directed to the said S. W. Pierce is about to be issued, citing and admonishing him to be and appear before the Supreme Court of the United States, to be held at Washington, in the District of Columbia:

Now the condition of the foregoing obligation is such that if the said Easterling Lumber Company and O. L. Benway and T. R. Thames shall prosecute their writ of error to effect, and shall answer all damages and costs that may be awarded against them, if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

EASTERLING LUMBER COMPANY.
By EDWARD MAYES,
Attorney of Record.

T. R. THAMES,
O. L. BENWAY,
BROOKHAVEN BANK & TRUST COMPANY,
Surety.
By Z. D. DAVIS President.
By W. D. DAVIS, Cashier.
Z. D. DAVIS.
W. D. DAVIS.

(Seal.)

Approved July 15, 1914.

GEO. C. MYERS,
Clerk.

We do hereby agree that the foregoing bond is sufficient, and may be approved by the Clerk of the Supreme Court of Mississippi; and we waive issuance and service of citation the same to be taken as if done on this date, July 14th, 1914.

E. L. DENT and
HIRSH, DENT & LANDAU,
Attorneys for Appellee.
MAYES & MAYES,
Attorneys for Appellants.

# IN THE
# SUPREME COURT OF THE UNITED STATES OF AMERICA

EASTERLING LUMBER COMPANY, et al., *Plaintiffs in Error.*

*vs.*

S. W. PIERCE, *Defendant in Error.*

Come the plaintiffs in error, by their attorneys, and file the following assignment of errors upon which they, and each of them, will rely upon their prosecution of the writ of error in the above entitled cause from a judgment entered by the Supreme Court of the State of Mississippi on the second day of March, 1914, in said above entitled cause.

The Supreme Court of the State of Mississippi erred in rendering the judgment and opinion rendered by them in this cause on the second of March, 1914, whereby said Supreme Court affirmed the judgment theretofore rendered by the Circuit Court of Covington County, in the State of Mississippi, against the plaintiff in error, the Easterling Lumber Company.

First: Because the judgment of the trial court and the judgment of the said Supreme Court affirming the same, are in violation of the Fourteenth Amendment to the Constitution of the United States, in that they deny to plaintiffs in error the equal protection of the law.

Secondly: Because the judgment of the trial court, and the judgment of the said Supreme Court affirming the same are in violation of the Fourteenth Amendment to the Constitution of the United States in that they deny to plaintiffs in error the equal protection of the law in this; that they give effect to, and enforce as against the plaintiffs in error, Chapter 194 of the Mississippi Session Laws of the year 1908, which statute is void because repugnant to the equality clause of the Fourteenth Amendment, aforesaid:

Third: Because the judgment of the trial court and the judgment of the said Supreme Court affirming the same are in violation of the Fourteenth Amendment to the Constitution of the United States, in that they denied to plaintiffs in error the equal protection of the law, and also deprived them of their property without due process of law, in this: that they give effect to, and enforce as

against plaintiffs in error, Chapter 215 of the Mississippi Session Law, 1912, which statute was enacted subsequently to the injury sued on.

Wherefore the said Easterling Lumber Company, plaintiffs in error, and the other plaintiffs in error who are the sureties on the appeal bond of said Easterling Lumber Company, in the appeal to the Supreme Court of Mississippi, and against whom, as well as against the Easterling Lumber Company, the said judgment of the Supreme Court of Mississippi can, because of their suretyship, pray judgment of the Supreme Court of the United States of America that the judgment in the Supreme Court of Mississippi, aforesaid, be reversed; and that the cause be remanded to that court with proper instructions.

EDWARD MAYES and T. BRADY, JR.,
Attorneys for Plaintiffs in Error.

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IN THE

# SUPREME COURT OF THE UNITED STATES

TO THE OCTOBER TERM, 1914.

No. 589.

EASTERLING LUMBER COMPANY et al.,
*Plaintiffs in Error.*

*vs.*

S. W. PIERCE,
*Defendant in Error.*

## REPLY BRIEF OF THE DEFENDANT IN ERROR

Of Counsel
for Defendant in Error.

HIRSH, DENT & LANDAU,
Vicksburg, Mississippi.
E. L. DENT,
Collins, Mississippi.
Of Counsel
for Defendant in Error.

# IN THE SUPREME COURT OF THE UNITED STATES

TO THE OCTOBER TERM, 1914.

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No. 589.

---

EASTERLING LUMBER COMPANY et al.,
*Plaintiffs in Error.*

*vs.*

S. W. PIERCE,
*Defendant in Error.*

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## REPLY BRIEF OF THE DEFENDANT IN ERROR

The Plaintiffs in Error having filed an additional brief, and having failed therein to comment upon, or review, the many cases we have cited, and *in fact*, having failed to cite any case *whatever, which we regard* as applicable, and having especially condemned the Mississippi statute (Act 1908) because, among other things, it does not embrace steamboats, etc., we think it proper to briefly reply to their argument, for their failure to cite authorities, justifies the assertion, that they could not find any, (we submit there are none) which tend to sustain their fallacious proposition.

It is pertinent to note that they have formally and unhesitatingly abandoned the contention, so vigorously presented in the Circuit Court, and in the Supreme Court of the State of Mississippi, that the *prima facie Act of 1912 was invalid* under the 14th Amendment of the Constitution of the United States, and this warrants, we also submit, the contention set forth in our original brief, that this writ of error was sued out solely for delay.

They still, however, undertake to present an *argument* seeking to support the *proposition*, as stated, that the said Act of 1908 violates the equality clause of the 14th Amendment of the Federal Constitution.

An interesting case in this connection, which has been entirely overlooked by Plaintiffs in Error, is Mondou vs. New York, New Haven & Hartford Railroad Co., and other cases, 223 U. S., Page 1, which was cited in our original brief on Page 14, in quoting from the opinion of Chief Justice White, in Missouri Pacific Railroad Co. vs. Castle, 224 U. S., pp. 541-544.

In that case it was strenuously argued by the counsel representing the Railroad Company:

> "The Act violates the Fifth Amendment because: It imposes upon *common carriers by rail* engaged in interstate commerce liabilities which are not imposed *upon others engaged in* interstate commerce; it deprives common carriers *by rail* engaged in interstate commerce of defenses which are available to others engaged in interstate commerce; it limits the powers of contract of common carriers *by rail* engaged in interstate commerce in their relations with their employes, and does not limit such powers of others engaged in interstate commerce."
>
> "*Congress sought no reasonable or proper basis for the classification, although* its attention was *directed to the necessity for such a distinction.* See Cong. Rec. 1908, 4433. Congress is not seeking to regulate interstate commerce by regulating the hazardous business of operating a railroad, but is attempting to regulate carriers *by rail* in all of their departments, and liability is imposed in favor of *all* employes while engaged in interstate commerce."
>
> "It includes within its terms only *one class* of *employers* who are engaged in interstate commerce; namely, *railroads.* It discriminates against railroad *companies* engaged *in interstate commerce* who *operate and maintain boats, wharves, docks and incidental equipment*, and *other employers engaged* in *interstate commerce operating and maintaining boats, wharves, and incidental equipment under precisely the same conditions.*" (Italics Ours.)

The Court disposes of this contention of Counsel for the Railroad, by saying:

> "It is true that the liability which the Act creates is imposed only on interstate *carriers by railroad*, although *there are other interstate carriers*, and is imposed for the benefit *of all employes* of such *carriers by railroad* who are employed in interstate commerce, *although some are not subjected to the peculiar hazards incidental to the operations of trains, or to*

> *hazards that differ* from those to *which other* employes in *such commerce, not within the Act*, are exposed. But it does not follow that this classification is violative of the 'due process of law' clause of the Fifth Amendment.
>
> Even if it be assumed that that clause is equivalent to the 'equal protection of the laws' clause of the Fourteenth Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor *does it condemn exertions* of *that power merely because they occasion some* inequalities. On the contrary, it *admits of the exercise of* a *wide discretion in classifying* according to general *rather than minute, distinctions*, and *condemns* what is done only when it is without any *reasonable* basis, and therefore is purely arbitrary. Lindsley vs. Carbonic Gas Co., 220 U. S. 61, 78. Tested by these standards, this classification is not objectionable. Like classifications of railroad carriers and employes for like purposes, when assailed under the equal protection clause, have been sustained by repeated decisions of this court. Missouri Pacific Railway Co. vs. Mackey, 127 U. S. 205; Louisville & Nashville Railroad Co. vs. Melton, 218 U. S. 36; Mobile, Jacksoa & Kansas City Railroad Co. vs. Turnipseed, 219 U. S. 35."

This rule applies with equal force to this case, and answers every argument now made, and it would be needless extension of this brief to make any further reply thereto.

We further respectfully submit, that a *solemn Act* of a *Sovereign State*, and the decision of the Highest Court of that State maintaining the validity of that statute, cannot be condemned and overthrown, by such suggestions, as the following:

> "This court will observe that the Mississippi Court cites no precedent whatever for its decision."

We contend that counsel are mistaken, for the Court does cite precedents, which we charge the Plaintiffs in Error failed to do.

They further say:

> "The question is not reasoned out in any wise whatever." "It is *simply the dixit of the three* gentlemen who happened to be *on the State bench*."

We respectfully submit that the Supreme Court of Mississippi *did carefully consider* the cases in this court, and the *argument* there presented by counsel.

The court specially referred to Aluminum Co. vs. Ramsey, 222 U. S. 251; Taylor vs. Prairie Pebble Phosphate Co. (1911) 61 Fla., 455, 54 South. 904; Railroad Co. vs. Melton, 218 U. S. 36; 30 Sup. Ct., 676, 54 L. Ed. 921, and the cases therein cited; and Willoughby on the Constitution, Section 484.

The court also referred to Tullis vs. Lake Erie W. R. Co., 175 U. S. 348, 20 Sup. Ct., 136, 44 L. Ed. 192; Minn. Iron Co. vs. Kline, 199 U. S. 593, 26 Ct. 159, 50 L. Ed. 322, and evidently gave painstaking consideration to the somewhat novel argument and discussion of the Plaintiffs in Error.

It may also be noted in response to said suggestions of Plaintiffs in Error, that the Defendant in Error was not injured by *lever power*, or a *hand-car*, running on *tracks*, but was permanently disfigured and injured in a collision between two locomotives, while operating a locomotive propelled "by the dangerous" agency "of steam"—"and running on tracks."

Every question raised in this proceeding was carefully considered by the Supreme Court of the State of Mississippi, and decided against the contention of the Plaintiffs in Error.

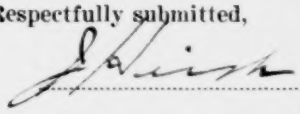
We maintain that the only question they have undertaken to argue, in this court, the constitutionality of the Act of 1908, has been foreclosed by the many decisions of this court and of the State courts, as shown in our original brief, and therefore, the proposition is "frivolous."

We cite from the opinions of the court in the following cases reported in 233 U. S., which are also pertinent:

> "A state statute imposing double damages and otherwise valid, is not unconstitutional as denying the equal protection of the laws because it applies only to railroad companies, and not to litigants in general. The classification is not arbitrary. (Seaboard Air Line vs. Seegers, 207 U. S. 73.) Kansas City Southern Ry. Co. vs. Anderson, 325."
>
> "If the classification is otherwise reasonable, a state statute does not deny equal protection of the law, because attorney's fees are allowed to successful plaintiffs only, and not to successful defendants. The classification is reasonable. Missouri, K. & T. Ry. Co. vs. Cade, 642."
>
> "The Fourteenth Amendment does not require that state laws shall be perfect. Missouri, K. & T. Ry. Co. vs. Cade, 642."

We further maintain that this writ of error was sued out for the purpose of delay, and that ten per cent. damages should be allowed as authorized by Subdivision 2, Rule 23.

Respectfully submitted,



Of Counsel
for Defendant in Error.

HIRSH, DENT & LANDAU,
Vicksburg, Mississippi.

E. L. DENT,
Collins, Mississippi.
Of Counsel
for Defendant in Error.

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Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1914.**

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## No. 589.

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THE EASTERLING LUMBER COMPANY, O. L. BENWAY, AND T. R. THAMES, PLAINTIFFS IN ERROR,

*vs.*

S. W. PIERCE, DEFENDANT IN ERROR.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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**BRIEF IN OPPOSITION TO MOTION TO DISMISS.**

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EDWARD MAYES,
*Jackson, Miss.,*
*Attorney for Plaintiffs in Error.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

# No. 589.

EASTERLING LUMBER COMPANY ET AL., PLAINTIFFS IN ERROR,

*vs.*

S. W. PIERCE, DEFENDANT IN ERROR.

## BRIEF IN BEHALF OF PLAINTIFFS IN ERROR ON MOTION TO DISMISS OR AFFIRM.

The defendant in error does not contend, on this motion, that the Federal question assigned as the basis for this appeal was not properly raised in the State courts. On the contrary, on page 3 of their brief, they expressly show that such points were duly raised, both in the State trial court and in the State Supreme Court.

His motion to dismiss, as appears on page 4 of his brief, is based solely on the ground alleged "that the alleged Federal questions are frivolous, and have been expressly foreclosed by decisions of this court."

In this discussion, therefore, the sole and narrow question is whether the appeal taken to this court does, or does not,

present a meritorious Federal question; it is not, of course, whether the question so presented is one which should ultimately be decided in favor of the appellant, but only whether, as a question, it is meritorious, and deserves this court's consideration.

We affirm that it is meritorious and should receive this court's careful consideration. In order to understand exactly the question presented, it is necessary to take a brief review of the legislation and the judicial decisions in Mississippi, germane to this litigation.

For many years the statutory law in Mississippi, modifying the common-law rule of the non-liability of the master for the negligence of a fellow-servant, stood as it is expressed in section 4056 of the Code of 1906, which section reads, so far as it is pertinent to this discussion, as follows:

> "4056. *Fellow-servant Rule.*—Every employee of a railroad corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employees as are allowed by law to other persons not employees, where the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work."

The foregoing statute was the outgrowth of section 193 of the Mississippi Constitution, adopted in 1890, which is as follows:

> "SECTION 193. Every employee of any railroad corporation shall have the same right and remedies for any injury suffered by him from the act or omission of said corporation or its employees, as are allowed by law to other persons not employees where the injury results from the negligence of a superior agent or officer or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from

> that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employee injured, of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them. Where death ensues from any injury to employees, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by any employee to waive the benefit of this section shall be null and void; and this section shall not be construed to deprive any employee of a corporation or his legal or personal representative, of any right or remedy that he now has by the law of the land. The Legislature may extend the remedy herein provided for to any other class of employees."

Such being the constitutional rule and the statute which the Legislature enacted pursuant to its mandate, the Supreme Court of Mississippi, in various decisions, has construed and applied that statute. It is *not* necessary to set forth here any number of those decisions. This court will be sufficiently informed when we cite and briefly quote from the case of *Givens vs. Ry. Co.*, 94 Miss., 830. In this case they sum up the whole doctrine, and they are so summing it up in view of the statute quoted above, as well as in view of the constitutional provision; although, in fact, in the text quoted, they allude only to the constitutional provision. The court said as follows on pages 847-8:

> "The point most seriously pressed upon us by the learned counsel for appellant is that a hand car is within the principle of section 193 of the constitution of 1890. The cases of *Ballard vs. Cotton Oil Mill*, 81 Miss., 507; *Bradford Construction Co. vs. Teflin*, 88 Miss., 314, and *Mobile, etc., R. Co. vs. Hicks*, 91 Miss., 273, have settled certain propositions beyond further debate in this State. These propo-

sitions are as follows: First, that section 193 of the constitution of 1890 embraces alone commercial railroads, railroads proper, carrying freight and passengers, and not logging railroads or mining railroads, etc.; second, that the only reason why section 193 can be upheld as constitutional is, as held by the United States Supreme Court in repeated adjudications referred to in the three cases, *supra*, that such classifications of such railroads proper can be properly maintained only because of the fact of the inherent danger attending the operation of such railroads by the highly dangerous agency of steam; in other words, because such commercial railroads do imperil the lives of their employees, by reason of the inherent danger of the operation of such railroad trains; third, that even the employees of such railroad corporations proper can only recover, against such railroads where they are injured by reason of the perils attending the operation of such commercial railroads.

"When we said in the case of *Bradford Construction Co. vs. Heflin*, 88 Miss., at page 361; 42 South., at page 182, that 'said section 193 of our constitution applies to railroad corporations proper which are engaged in the business of common carriers transporting freight and passengers, and to such employees when injured whilst doing work in some manner connected with the operation and use of the railroads,' we meant by the word 'railroads' railroads proper—commercial railroads carrying freight and passengers. To our minds the proposition that a hand car is inherently dangerous is one that cannot be supported on reason or principle. Hand cars are no more inherently dangerous than other modes of transportation not in any way connected with railroads proper, and not used on the rails of railroads proper. We are clearly of the opinion that a hand car, therefore, is not within the reason which supports section 193 of our constitution as a constitutional provision not in conflict with the Fourteenth Amendment to the Constitution of the United States."

This court is now in a position to appreciate what it was that the Legislature of Mississippi was doing when they passed the statute of which, by this appeal, we make complaint, being the act, chapter 194 of the Laws of 1908, page 204, amending section 4056 of the Code of 1906, and which amendatory act, so far as is necessary to consider in this case, was as follows:

> *"Fellow-servant Rule Abolished as to Actions by Railroad Employees, etc.*
>
> "SECTION 1. Every employee of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, shall have the same rights and remedies for an injury suffered by him from the act or omission of such railroad corporation or others, or their employees, as are allowed by law to other persons not employed."

It will be seen at once, and clearly, that this amendatory act of 1908 makes a far greater innovation upon the common-law doctrine than did the constitution or any of the earlier statutes passed pursuant to the constitution. Whereas the constitution and those earlier acts extended such innovation no further than to the employees of railroad companies, this amendatory act extends the innovation to the employees of any sort of person, whether corporate or natural, provided only such person employed the instrumentalities described by the statute. And the instrumentalities so described include all those instrumentalities which railroad companies employ and which were included in the earlier legislation, but include also instrumentalities which railroad companies do not employ and which the Supreme Court of Mississippi decided, as shown above, even if employed by

a railroad company still, have not been intended by the earlier statute or by the constitution.

We claim that this statute flagrantly violates the equality clause of the Fourteenth Amendment to the Constitution of the United States; but our claim is not based on the idea suggested in the brief of the defendant in error. The special point *here* is, not that the Legislature has undertaken to extend the remedy provided for to "any other class of employees" than employees of railroads; not that the Legislature has, in effect, extended such remedies to employees of logging roads, considered as such. Not at all; but the point is that such remedy as the statute provides for all employees is, by the very terms of the statute, extended to those employees, but to those employees only, who are employed by such, whether corporations or individuals, as are using engines, locomotives, or cars, of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline, or lever power *and running on tracks*. Here is the fly in the ointment—"running on tracks." It is made *conditio sine qua non* to the operation of this statute that the engine, locomotive, or what not shall run on a track; all other employees are left out, and are left as at the common law. Whatever the nature of the work done, or the nature of the instrumentality employed, or of the motive power, the vehicle must move on a track.

We insist very earnestly that such consideration as moving on a track is no proper and constitutional basis for a classification, especially for a classification which so profoundly modifies the common law, and so largely sets aside the common-law rights of the employer.

It is well-settled law, and in the United States Supreme Court, as well as in the State courts, that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, but the classification must be based on some reasonable ground, some difference which bears a just and proper rela-

tion to the attempted classification, and is not a mere arbitrary selection.

Ballard *vs.* Miss. Cotton Oil Co., 81 Miss., 557.
Bradford Const. Co. *vs.* Heflin, 88 Miss., 314.
Mobile, etc., R. Co. *vs.* Hicks, 91 Miss., 273.
Givens *vs.* Railway Co., 94 Miss., 830.
Gulf R. Co. *vs.* Ellis, 165 U. S., 150.
Magroun *vs.* Illinois, etc., Bank, 170 U. S., 294.
Nicol *vs.* Ames, 173 U. S., 521.
Erb *vs.* Marasch, 177 U. S., 586.
W. W. Cargill Co. *vs.* Minn., 180 U. S., 469.
Cotting *vs.* Kansas, etc., Co., 183 U. S., 107.
Connelly *vs.* Union Pipe Co., 184 U. S., 561.
Fidelity Ass'n *vs.* Mettler, 185 U. S., 325.

The classification attempted by this statute is not based on the fact that the ownership of the vehicle is that of a railroad company; or that the service in which the vehicles were engaged at the time of the injury inflicted was the service of a railroad company, for the reason that the statute is so extended as to embrace any sort of car or engine moving on a track, owned by any corporation, or any person. It is not based on the fact that the vehicles involved were moved or operated by the dangerous agencies, either of electricity or steam, as clearly appears from the fact that it is extended even to cars that are operated by lever power; which means man power; which means a mere hand car; or even a tricycle operated by the occupant alone.

The whole classification, therefore, is one, not of the business in and about which the vehicle is engaged, not of the motive power by which the vehicle is propelled, but wholly is based on the fact that the vehicle moves on a track.

We submit that a classification based wholly on that consideration, as here, is not based on a reasonable ground, and there is no difference which bears any just or proper rela-

tion to the attempted classification made. The selection, within the purview of constitutional principle, is one merely arbitrary.

To illustrate and enforce this position we shall instance a few cases of its manifest application.

The statute is so drawn as now to be applicable to the employees of a street railway company, because its cars move on tracks; but it is not applicable to the employees of a transfer company whose vehicles are propelled by electricity, and may be sixty horse-power taxicabs or omnibuses, or freight wagons, for no other reason than this, that they move on paved streets and not on tracks; in other words, because this latter class of vehicles has a less circumscribed field of movement, and, therefore, is, in fact, all the more dangerous, it is excluded from the classification.

Again, the statute includes street railway cars; but it would wholly exclude an immense, very heavy, powerful and dangerous traction engine, even although that engine has been engaged, as is not uncommonly the case, in pulling a train containing more or less, in number, of dump-cars, this latter train being excluded for the simple reason that it doesn't move on iron rails, but moves on highways. A man engaged in working about this train, and operating it, is not entitled to the protection of the statute, or its privileges. A man engaged about an ordinary street car is entitled. It is not a reasonable classification.

Again, the statute includes protection to employees who are engaged on or about the simple appliance of a hand car, or even on or about so light a vehicle, and one so entirely under the control of the operator, as a railroad tricycle; but his vehicle moves on a track, while, on the other hand, an employee engaged on and about the formidable and dangerous taxicab, traction engine, even with its train of dump-cars attached, are not protected by the statute.

But there are even more striking illustrations: Take, for instance, the case of a great public work going on, say, in

the city of Jackson, Mississippi. Various parties have contracted with the builder to haul dirt, or brick, or stone It so happens that the source of supply for one contractor is such that he can make an arrangement with the street railway company, which happens to have tracks immediately contiguous to his place of excavation, or to his brick kiln, for trackage rights, by which he has the privilege of hauling his floats over their track, drawing them by some small machine run by steam or electricity or gasoline.

The other contractor has floats of a similar character, but there is no contiguous street railway track, so that he has to haul his material on his floats, drawn over the paved street, or road, by a traction engine.

The liability would exist in the one case; it would not in the other, yet there is no essential difference in the character of the work. The only difference being, in fact, that one set of floats runs on a line of rails and the other one on the pavement.

Again, this statute, as shown above, extends a new rule to employees engaged on vehicles which are, in point of fact, not dangerous inherently, as is expressly held in the Givens case, cited above, but it denies the rule to those employees who are engaged in and about the most dangerous of all instrumentalities—that is to say, to those engaged about steamboats, steamships, airships, even the Zeppelins—simply for the reason that these evidently dangerous moving vehicles do not run on tracks.

It seems to us that the case is reducible to an absurdity. Take, for instance, the movement of a carload of lumber at Gulfport, Mississippi. The car has reached Gulfport, and has been sidetracked. Its railway trip is over. It needs to be loaded on shipboard. A switch engine of the Gulf & Ship Island Railroad Company moves the car a half mile over the pier, and spots it opposite an ocean-going steamer. That is the least dangerous portion of the whole operation, yet those employees who are engaged in that work receive

the benefit of the statute. Those employees who receive the lumber as spotted, handle it with cranes, work by steam power, transfer it from the railway car to the hold of the steamer, and do much the more dangerous part of the whole work are not protected by the statute, they *not* moving over any track and their steamer moving over none.

The court will, therefore, see that this classification of which we complain is not made based on the ownership of the vehicle, as by a railroad company; nor is it based on the nature of the work in which the vehicle inflicting the injury may be engaged, nor on the dangerous character of such work; nor is it based on the ponderous, weighty, and comparatively uncontrollable character of the vehicles; nor is it based on the fact that vehicles are moved by any of the dangerous agencies, such as steam or electricity, but it is based only and exclusively on the fact that the vehicle runs on a track.

We therefore submit, again, that such classification is not reasonable, but is arbitrary, and that it has no proper relation to the nature of the instrumentality about which it is made.

The Supreme Court of Mississippi, in their opinion in this case (see brief of defendant in error, page 57, bottom), says as follows:

> "The statute provides that the remedies extend to all employees using engines, locomotives, or cars owned and operated by railroad corporations and all other corporations and individuals. In short, the class made by the statute is all employees using such engines, locomotives and cars of all kinds and descriptions propelled by the dangerous agencies specified and running on tracks, that is, on a defined way such as used by railroads. We deem this a reasonable classification which applies equally to all in the same situation."

This court will observe that the Mississippi court cites no precedent whatever for its decision. It says that "we deem

this a reasonable classification," but it gives no reason whatever for so deeming, and the conclusion is itself, we respectfully submit, quite unreasonable and within the condemnation of the rule relied on by us. The question is not reasoned out in anywise whatever. It is simply the dixit of the three gentlemen who happen to be on the State bench.

It is true the State Supreme Court said this: "We deem this a reasonable classification, which applies equally to all in the same situation." If by these expressions it is meant to indicate that the fact that a classification made applies equally to all in the same situation, justifies such classification of itself, we submit that this is erroneous. Nor did Justice McKenna, in the language quoted on page 58 of defendant's brief, from the case of *Aluminum Company vs. Ramsey*, 222 U. S., 251, so mean. The expression used, and apparently relied on by the Mississippi court, occurs not only in that case, but in others. Yet this court has never decided that the mere fact of equality within the proposed class justifies the class, but, on the contrary, has repeatedly indicated otherwise.

The reason is obvious. It is a reason inherent in the nature of things; inherent in the very conception of classification. What is classification? It is, and necessarily it must be, a process at once of exclusion and of inclusion. The class must be composed of an aggregate of individuals from the body of which all other individuals are excluded; also, the class must be composed of an aggregate of individuals within which several or many are included. There could be no class otherwise. Therefore, within constitutional principle, and to preserve that equality of the protection of the law about which this discussion arises, it necessarily is true that there must be equality within the class, as between the members of the class; otherwise the Constitution is violated. But, also, it is true that within the same constitutional principle there must be some reasonable ground on which the class that is constituted can be sep-

arated from the general mass of mankind. So that the full and true statement of the doctrine is that, in order that a class shall be constitutionally made, two things are necessary: First, the classification made must be placed on some reasonable relation existing between the making of the class and the purposes for which it is made, and, secondly, those who are included within the class must be equally dealt with. It takes the double test to make the class good.

If this were not true—if it were all-sufficient that those who are within the class are equally dealt with—then what would be the constitutional objection to this sort of legislation—a tax law providing that blue-eyed people shall pay taxes on the basis of four mills and all others on the basis of six mills? All the blue-eyed people would be equally dealt with, and all those who are not blue-eyed would also be equally dealt with. Would that be a good classification for taxation within constitutional principle? Most certainly not. But it meets the test suggested as being the sufficient test of good classification. The reason why it is not good, legally stated, is because it does not meet the other constitutional requisite, that there must be some rational relation between the classification made and the purpose for which it is made.

The Supreme Court of Mississippi seems to have entirely misapprehended the expressions used in various decisions of this court in which reference is had to the second requisite, of equality within the class, and to have treated such equality as if it were the sole requisite, which, of course, is erroneous.

We have herein presented, in some detail, the basis of our claim that the Fourteenth Amendment is violated by the decision of the State Supreme Court, but we have done so, not in order to submit to the court any argument on the merits of the case; that lies in the future; our purpose here is solely to show to the court that this appeal is not, as the defendant in error claims, a frivolous appeal, and that it should not be dismissed on motion. Our final contention may be right or

wrong, but we submit that the question presented, of the propriety of this classification, within constitutional principle, has not been foreclosed by any previous decisions of this court, and it deserves the serious consideration and decision of the court. It is a point of merit, and not a mere question of delay.

Respectfully submitted,

EDWARD MAYES,
*Attorney for Plaintiffs in Error.*

Office Supreme Court, U. S.
FILED
OCT 19 1914
JAMES D. MAHER
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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914

No. 589

EASTERLING LUMBER COMPANY, ET AL,
*Plaintiffs in Error*

*versus*

S. W. PIERCE,
*Defendant in Error*

**In Error to the Supreme Court of the State of Mississippi**

## Brief of Plaintiffs in Error on Motion of Defendant in Error to Dismiss or Affirm

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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

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No. 589.

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EASTERLING LUMBER COMPANY, et al.,

*Plaintiffs in Error.*

*vs.*

S. W. PIERCE,

*Defendant in Error.*

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## BRIEF OF PLAINTIFFS IN ERROR ON MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

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The Defendant in error contends as follows:

FIRST, that the writ of error in this case should be dismissed for want of jurisdiction because the Federal question presented is frivolous.

SECOND, that if this Court has jurisdiction the judgment of the Supreme Court of the State of Mississippi should be affirmed for the reason that the Federal question on which the decision of the case depends is frivolous.

It is apparent that the Defendant in error predicates his

rights to the remedies which he seeks in his motion squarely upon the contention that the Federal question presented in the case is a frivolous one The sole question, therefore, to be considered by this Court upon the motion of the Defendant in error may be correctly stated as follows:

Is the Federal question presented in this case so frivolous as to be explicitly foreclosed by the decision of this Court?

In order to answer this question, it becomes necessary to consider Chapter 194 of the Laws of the State of Mississippi of 1908, not for the purpose, however, of determining whether it is or is not violative of the equality clause of the Fourteenth Amendment to the Constitution of the United States, but to determine whether or not the contention of the Plaintiffs in error that it is violative of the equality clause is a meritorious one deserving the consideration of this Court. The language of that part of this chapter which the Plaintiffs in error contend makes it unconstitutional, because violative of the equality clause of the Fourteenth Amendment to the Constitution of the United States, is as follows:

> Section 1. Every employe of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, shall have the same rights and remedies for an injury suffered by him from the act or omission of such railroad corporation or others, or their employes, as are allowed by law to other persons not employed.

In order to present clearly the contentions of the Plaintiffs in error, it is necessary to review briefly the legislative and judicial development of the law fixing liability on the master

for the negligence of a fellow servant.

The common law rule of nonliability of the master for the negligence of a fellow servant was first modified by Section 193 of the Constitution of the State of Mississippi, adopted A. D. 1890, which reads as follows:

> "Section 193 Every employe of any railroad corporation shall have the same right and remedies for any injury suffered by him from the act or omission of said corporation or its employes, as are allowed by law to other persons not employes where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employe injured, of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them. When death ensues from an injury to employes, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by an employe to waive the benefit of this section shall be null and void; and this section shall not be construed to deprive any employe of a corporation or his legal or personal representative, of any right or remedy that he now has by the law of the land. The legislature may extend the remedy herein provided for to any other class of employes."

After the adoption of this section, the Legislature

modified the common law rule, which for many years remained the law as expressed in Section 4056 of the code of 1906, the pertinent part of which is in language as follows:

> "4056 (3559) Fellow-servant rule.—Every employe of a railroad corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employes as are allowed by law to other persons not employes, where the injury results from the negligence of a superior agent or officer, or of a person having the right to direct or control the services of the party injured, and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or of one engaged about a different piece of work."

After the adoption of Section 193 of the Constitution of the State of Mississippi the Supreme Court of the State of Mississippi considered this Section and construed and applied the law as later re-enacted by Section 4056 of the code of 1906 in the following cases:

> Ballard v Cotton Oil Co., 81 Miss. 507,
> Bradford Construction Co v Heflin, 88 Miss. 314,
> Mobile, etc. Railway Company v. Hicks, 91 Miss. 273,
> Givens vs. Railway Company, 94 Miss. 830.

While considering the law, re-enacted in Section 4056, the Court in the Givens case said as follows:

> "The point most seriously pressed upon us by the learned counsel for appellant is that a hand-car is within the principle of section 193 of the Constitution of

1890 The cases of Ballard v Cotton Oil Mill, 81 Miss. 507, Bradford Construction Co. v Heflin, 88 Miss. 314, and Mobile, etc. R. Co. v. Hicks, 91 Miss. 273, have settled certain propositions beyond further debate in this state. These propositions are as follows: First, that Section 193 of the Constitution of 1890 embraces alone commercial railroads, railroads proper, carrying freight and passengers, and not logging railroads or mining railroads, etc ; Second, that the only reason why Section 193 can be upheld as constitutional is, as held by the United States Supreme court in repeated adjudications referred to in the three cases, supra, that such classifications of such railroads proper can be properly maintained only becauseof the fact of the inherent danger attending the operation of such railroads by the highly dangerous agency of steam; in other words, because such commercial railroads do imperil the lives of their employes, by reason of the inherent danger of the operation of such railroad trains; Third, that even the employes of such railroad corporations proper can only recover against such railroads where they are injured by reason of the perils attending the operation of such commercial railroads

"When we said in the case of Bradford Construction Co. v. Heflin, 88 Miss., at page 361, 42 South., at page 182, that 'said section 193 of our constitution applies to railroad corporations proper which are engaged in the business of common carriers transporting freight and passengers, and to such employes when injured whilst doing work in some manner connected with the operation and use of the railroads', we meant by the word 'railroads' railroads proper—commercial railroads carrying freight and passengers. To our minds the proposition that a hand-car is inherently dangerous is one that cannot be supported on reason or principle. Hand-cars are no more inherently danger-

ous than other modes of transportation not in any way connected with railroads proper and not used on the rails of railroads proper We are clearly of the opinion that a hand-car, therefore, is not within the reason which supports section 193 of our constitution as a constitutional provision not in conflict with the fourteenth amendment to the constitution of the United States."

With the law so announced, wherein a similar statute, viz: the act of 1898, was held unconstitutional, it becomes evident that it was the purpose of the Legislature of the State of Mississippi to alter radically the law of the State on this subject by enacting Chapter 194 of the laws of 1908, amending Section 4056 of the code of 1906.

The Plaintiffs in error do not contend that the law as it formerly existed in this state may not be broadened by legislative enactment, but they do contend that such radical changes cannot be made without violating the equality clause of the Fourteenth Amendment to the Constitution of the United States, unless the rules of law for so doing laid down by this Court be observed.

The Plaintiffs in error contend that the Legislature did not, in enactng this statute, observe the rule of law announced by this court, under which a valid act might have been passed, and in failing so to do, flagrantly violated the equality clause of the Fourteenth Amendment

This court has decided that statutes of this character cannot escape the violation of the equality clause of the Fourteenth Amendment by mere classification; the classification created by them must be based upon some reasonable ground, some difference which bears a just and reasonable relation to the classification and not upon a mere arbitrary selection In other words, the classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbi-

trarily.

Gulf R. Co v. Ellis, 165 U. S., 150,
Magroun v. Illinois, etc. Bank, 170 U. S., 204,
Nicol v Ameg, 173 U. S , 521,
Erb v. Marasch, 177 U. S., 586,
W. W. Cargill Co. v. Minn., 180 U. S , 469,
Cotting v Kansas, etc , Co., 183 U. S 107,
Connelly v Union Pipe Co. 184 U S. 561,
Fidelity Ass'n. v Mettler, 185 U. S., 325

Plaintiffs in error do not contend that the Legislature of the State of Mississippi was without the power to extend the remedy provided by the statute to any other class of employes than those of commercial railroads, as Defendant in error seems to think, but they do contend that the classification made by the statute does not rest on "Some reasonable ground, some difference which bears a just and reasonable relation to the classification created." They contend the classification is a mere arbitrary selection. The statute does not provide a remedy for "every employe of all corporations and individuals using engines, locomotives or cars of any kind and description whatsoever, propelled by the dangerous agency of steam, electricity, gas, gasoline or lever power," but provides a remedy, only, for all employes of corporations and individuals using engines, locomotives or cars propelled by these agencies when running on tracks.

In other words, all employes of all persons and corporations are denied the remedy provided by this statute, although the employes may be using engines, locomotives and cars, propelled by such agencies, unless the engines, locomotives or cars are running on tracks.

The dangerous agencies of steam, electricity, gas, gasoline and lever power do not form the basis for the classification, the inherent danger in the use of the dangerous agencies is not the basis for the classification; the classification rests upon no

reasonable ground or basis, but hinges squarely on the arbitrary fact that the vehicle moves on tracks The arbitrary fact upon which the classification is based, namely, running on tracks, simply determines the lines of inclusion and exclusion, thereby creating a class of masters and a class of servants This is all that is done. The classification is without rhyme or reason, and not based upon the rule announced by the decisions of this Court. The fact upon which the classification is based, namely, running on tracks, is a discrimination against employes who use such instrumentalities which do not run on tracks. Likewise, it is a discrimination against an employer whose employes use such instrumentalities which do run on tracks, since as to him, the fellow-servant doctrine is destroyed, while other employers whose employes use such instrumentalities which do not run on tracks are protected by the fellow-servant doctrine.

The fact upon which the classification rests, namely, running on tracks, does not in any way determine the rights of master and servant under any rule of reason It arbitrarily determines their rights without reference to their relations; it is not based upon any reasonable ground and the attempted classification is, therefore, an arbitrary selection, and consequently violative of the constitution. That the classification attempted is not reasonable, but is purely an arbitrary selection becomes apparent by the following illustrations:

Under this act an employe of a Street Car Company engaged in the transportation of passengers in the City of Washington, injured by the negligence of another employe of the Street Car Company, can recover for the reason that the Street Car Company used cars running on tracks, through the agency of electricity. But an employe of a Taxicab Company, engaged in the transportation of passsengers, in the City of Washington, if injured by another employe of the Taxicab Company cannot recover, and the reason, and the only reason, for his not being able to recover is because the car which is operated by the Taxicab Company does not run on tracks. There is no substantial differ-

ence in the nature of the businesses, no substantial difference in the risk to the employes, yet the Street Car Company is denied the defense of the negligence of a fellow-servant, while the Taxicab Company may take advantage of it On the other hand, the employe of the Street Car Company is not denied recovery on account of the negligence of a fellow-servant, while the employe of the Taxicab Company is denied recovery on account of the negligence of a fellow-servant.

The building of public highways by persons and companies is quite common. In constructing these highways, traction engines are in most instances used. They are propelled by steam and move a species of car called a float, or a dump car, in which is carried very heavy material In instances where the traction engines are used, employes of such corporations and individuals cannot recover on account of injury caused by negligence of a fellow-servant for the reason that the traction engines do not run on tracks. In some instances, however, tramroads are used in the building of public highways; in this instance an injured employe could recover on account of the negligence of a fellow-servant, for the reason that the engines used by the persons and companies engaged in the work run on tracks

Many other more fitting illustrations can, no doubt, be found. It, nevertheless, appears from these that the classification attempted by this statute is not based on the character of the work, or the kind of appliances, nor upon the agency propelling them, but is based solely and wholly upon an arbitrary selection. It follows, therefore, that the classification is not reasonable and has no relation to the nature of the instrumentalities about which it was made, nor has it any relation to the rights of the persons interested and whose rights are involved.

The Supreme Court of the State of Mississippi did not consider the contention which the Plaintiffs in error made, relative to the Federal question presented in the case, frivolous; in fact, it considered the Federal question one of merit because it gave it serious consideration, and the Chief Justice of the Supreme Court considered the question a serious one, otherwise he

would not have granted the writ of error.

The Supreme Court of the State of Mississppi, referring to the classification made by this act, said:

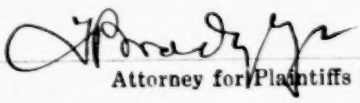
> "We deem this a reasonable classification which applies equally to all in the same situation"

But it nowhere cited authority, or for that matter, advanced argument for its conclusion The Court simply announced an opinion or view that the classification was reasonable The Court said "it applies equally to all in the same situation" The fact that it may apply equally to all in the same situation does not justify such a classification It was not held in the case of Aluminum Company vs Ramsey Vol. 222, U. S., 251, that the classification was reasonable because it alone applied to all in the same situation. Before a just and reasonable classification can be made under the rule announced by this Court, the classification must rest on some just and reasonable relation existing between the making of the class and the purpose for which it is made and, secondly, those who are included in the class must be equally dealt with. No just and reasonable classification can be made which does not take into consideration both of these tests.

It is not the purpose of the Plaintiffs in error to submit a brief in such detail as will present an argument on the merits of the Federal question involved. The similarity of the statute against which complaint is here made and that of those held by this Court to be unconstitutional is not shown, nor is the want of similarity between the statute here involved and statutes held to be constitutional presented. The question here to be determined is whether or not the contention of the Plaintiffs in error that the Federal question presented is a frivolous one. Plaintiffs in error submit that the question of the constitutionality of Chapter 194, which radically changes the fellow-servant doctrine in this state, and which has not been construed by this Court, is

not only not frivolous, but the question is one of merit and not of delay and deserves the serious consideration of this Court.

Respectfully submitted.



Attorney for Plaintiffs in Error.

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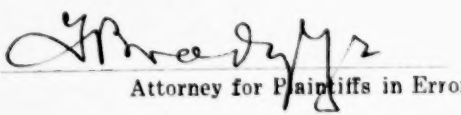
I hereby certify that I have this, October 13th, 1914, mailed to Hon. J. Hirsh, attorney for Defendant in Error, a copy of the foregoing brief of the Plaintiffs in Error on Motion of the Defendant in Error to dismiss or affirm.



Attorney for Plaintiffs in Error.

Signed Copy.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
Clerk

No. 589

IN THE

# SUPREME COURT of THE UNITED STATES

OCTOBER TERM, 1914.

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THE EASTERLING LUMBER COMPANY,
O. L. BENWAY, and T. R. THAMES,

Plaintiffs in Error,

vs.

S. W. PIERCE,
Defendant in Error.

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In Error to the Supreme Court of the State of Mississippi.

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## BRIEF ON MERITS, FOR PLAINTIFFS IN ERROR.

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TUCKER PRINTING HOUSE, JACKSON, MISS.

# IN THE SUPREME COURT OF THE UNITED STATES

TO THE OCTOBER TERM, 1914.

EASTERLING LUMBER COMPANY, ET ALS.,
PLAINTIFFS IN ERROR,
vs.
S. W. PIERCE,
DEFENDANT IN ERROR.

**No. 589.**

## STATEMENT AND BRIEF FOR PLAINTIFFS IN ERROR.

### STATEMENT OF THE CASE.

The Easterling Lumber Company, one of the plaintiffs in error, is a saw-milling corporation, with its principal place of business at Ora, a station on the Gulf & Ship Island Railroad. In connection with its manufacturing business, it owns and operates a railroad in connection therewith. This railroad, however, is not a commercial railroad, but is a logging road purely, and it runs westerly a distance of twleve or fifteen miles, to what is called "the Camp;" at which camp certain of its employes have their permanent headquarters. Between Ora and the camp is what is called a "Y;" and this "Y" is a passing place for the cars of the Lumber Company. From the camp the Lumber Company was accustomed to send an engine of the type known as a Shay, out to the "Y," to pick up and move cars which had been left there; and at the "Y" it was customary that this Shay engine should be passed by the logging train which went out every day from Ora to the camp, and back.

On a certain occasion, however, the usual routine failed, and a head-on collision occurred between the engine going from Ora out to the camp, and this Shay engine.

Defendant in error was the engineer in charge of the train, and by the collision he was severely and permanently injured, losing a leg, and receiving other injuries.

He brought suit against the plaintiff in error, the Easterling Lumber Company, in which he united as co-defendants two of the employes of said Company, charging that this collision occurred by reason of the negligence of the two employes so united as co-defendants. He recovered a judgment for $17,500.00, and this judgment the Supreme Court of the State affirmed on appeal taken by the Lumber Company.

From that judgment of affirmance of the Supreme Court of the State, this writ of error is taken.

In the trial court the Lumber Company made various defences; but all those defences are foreclosed by the decision of the State Supreme Court, and will not be urged on this Court, of course, except one or two, which we shall now present.

## SPECIFICATION OF THE ERRORS RELIED UPON.

The Supreme Court of the State of Mississippi erred in rendering the judgment and opinion rendered by them in this cause on the second of March, 1914, whereby said Supreme Court affirmed the judgment theretofore rendered by the Circuit Court of Covington County, in the State of Mississippi, against the plaintiff in error, the Easterling Lumber Company.

**First.** Because the judgement of the trial court and the judgment of the said Supreme Court affirming the same, are in violation of the Fourteenth Amendment to the Constitution of the United States, in that they deny to plaintiffs in error the equal protection of the law.

**Secondly.** Because the judgment of the trial court, and judgment of the said Supreme Court affirming the same are in violation of the Fourteenth Amendment to the Constitution of the United States, in that they deny to plaintiffs in error the equal protection of the law in this; that they give effect to, and enforce as against plaintiffs in error, chapter 194 of the Misssissippi Session Laws of the year 1908, which statute is void because repugnant to the equality clause of the Fourteenth Amendment, aforesaid.

T. BRADY, JR.,

EDWARD MAYES,

*Attorneys for Plaintiffs in Error.*

## BRIEF OF THE ARGUMENT.

First, the principal point on this writ of error is the question whether an act of the Mississippi Legislature, being chapter 194 of the Laws of 1908, page 204, amending section 4056 of the Code of 1906, is obnoxious to the Fourteenth Amendment to the Constitution of the United States. That State statute, so far as is necessary, is set forth here, and is as follows:

> "*Fellow-Servant Rule Abolished as to Actions by Railroad Employes, etc.*
>
> "SECTION 1. Every employe of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline, or lever power, and running on tracks, shall have the same rights and remedies for an injury suffered by him from the act or omission of such railroad corporation or others, or their employes, as are allowed by law to other presons not employed."

It will be observed that the foregoing statute was an amendment of section 4056 of the Code of 1906. For many years the statutory law in Mississippi, modifying the common-law rule of the non-liability of the master for the negligence of a fellow servant, stood as it is expressed in that section of the Code which is as follows:

> "4056. *Fellow-Servant Rule.*—Every employe of a railroad corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employes as are allowed by law to other persons not employes, where the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work."

The foregoing statute was the outgrowth of section 193 of the Mississippi Constitution, adopted in 1890, which is as follows:

"SECTION 193. Every employe of any railroad corporation shall have the same right and remedies for any injury suffered by him from the act or omission of said corporation or its employes, as are allowed by law to other persons not employes where the injury results from the negligence of a superior agent or officer or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employe injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defence to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them. Where death ensues from any injury to employes, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by any employe to waive the benefit of this section shall be null and void; and this section shall not be construed to deprive any employe of a corporation or his legal or personal representative, of any right or remedy that he now has by the law of the land. The legislature may extend the remedy herein provided for to any other class of employes."

Such being the constitutional rule, and the statute which the legislature enacted pursuant to its mandate, the Supreme Court of Mississippi, in various decisions, has construed and applied that statute. It is *not* necessary here to set forth any number of those decis-

ions. This Court will be sufficiently informed when we cite and briefly quote from the case of *Givens v. R'w. Co.*, 94 Miss., 830. In this case they sum up the whole doctrine, and they are so summing it up in view of the statute quoted above, as well as in view of the constitutional provision; although, in fact, in the text quoted, they allude only to the constitutional provision. The Court said as follows, on pages 847-8:

"The point most seriously pressed upon us by the learned counsel for appellant is that a hand car is within the principle of section 193 of the Constitution of 1890. The cases of *Ballard v. Cotton Oil Mill*, 81 Miss., 507; *Bradford Construction Co. v. Teflin*, 88 Miss., 314, and *Mobile, etc., R. Co. v. Hicks*, 91 Miss., 273, have settled certain propositions beyond further debate in this State. These propositions are as follows: First, that section 193 of the Constitution of 1890 embraces alone commercial railroads, railroads proper, carrying freight and passengers, and not logging railroads or mining railroads, etc.; second, that the only reason why section 193 can be upheld as constitutional is, as held by the United States Supreme Court in repeated adjudications referred to in the three cases, *supra*, that such classifications of such railroads proper can be properly maintained only because of the fact of the inherent danger attending the operation of such railroads by the highly dangerous agency of steam; in other words, because such commercial railroads do imperil the lives of their employes, by reason of the inherent danger of the operation of such railroad trains; third, that even the employes of such railroad corporations proper can only recover, against such railroads where they are injured by reason of the perils attending the operation of such commercial railroads.

"When we said in the case of *Bradford Construction Co. v. Heflin*, 88 Miss., at page 361; 42 South., at page 182, that 'said section 193 of our

Constitution applies to railroad corporations proper which are engaged in the business of common carriers transporting freight and passengers, and to such employes when injured whilst doing work in some manner connected with the operation and use of the railroads.' we meant by the word 'railroads' railroads proper—commercial railroads carrying freight and passengers. To our minds the proposition that a handcar is inherently dangerous is one that cannot be supported on reason or principle. Hand cars are no more inherently dangerous than other modes of transportation not in any way connected with railroads proper, and not used on the rails of railroads proper. We are clearly of the opinion that a hand car, therefore, is not within the reason which supports section 193 of our Constitution as a Constitutional provision not in conflict with the Fourteenth Amendment to the Constitution of the United States."

The Court is now in a position to appreciate what it was that the legislature of Mississippi were doing when they passed the statute, chapter 194 of the Laws of 1908, set forth above, by way of amendment to section 4056 of the Code of 1906, and of which we make complaint.

It will be seen at once, and clearly, that this amendatory act of 1908 makes a far greater innovation upon the common law doctrine than did the constitution or any of the earlier statutes passed pursuant to the Constitution. Whereas, the Constitution and those earlier acts extended such innovation no further than to the employes of railroad companies, this amendatory act extends the innovation to the employes of any sort of person, whether corporate or natural, provided only such person employed the instrumentalities described by the statute. And the instrumentalities so described include all those instrumentalities which railroad companies do employ, and which are included in the

earlier legislation, but include also instrumentalities which railroad companies do not employ, and which the Supreme Court of Mississippi decided, as shown above, even if employed by a railroad company, still, have not been intended by the earlier statute or by the Constitution.

We claim that this statute flagrantly violates the equality clause of the Fourteenth Amendment to the Constitution of the United States. The special point *here* is, not that the Legislature has undertaken to extend the remedy provided for to "any other class of employes" than employes of railroads; not that the legislature has, in effect, extended such remedies to employes of logging roads, considered as such. Not at all; but the point is that such remedy as the statute provides for all employes is, by the very terms of the statute, extended to those employes, but to those employes only, who are employed by such, whether corporations or individuals, as are using engines, locomotives or cars, of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power *and running on tracks*. Here is the fly in the ointment—"running on tracks." It is made *conditio sine qua non* to the operation of this statute that the engine, locomotive, or what not, shall run on a track; all other employes are left out, and are left as at the common law. Whatever the nature of the work done, or the nature of the instrumentality employed, or of the motive power, the vehicle must move on a track.

We insist very earnestly that such consideration as moving on a track is no proper and constitutional basis for a classification, especially for a classification which so profoundly modifies the common law, and so largely sets aside the common law rights of the employer.

It is well settled law, and in the United States Supreme Court, as well as in the State Courts, that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, but the classification must be based on some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.

*Ballard v. Miss. Cotton Oil Co.*, 81 Miss., 557;
*Bradford Const. Co. v. Heflin*, 88 Miss., 314;
*Mobile, etc., R. Co. v. Hicks*, 91 Miss., 273;
*Givens v. Rw. Co.*, 94 Miss., 830;
*Gulf R. Co. v. Ellis*, 165 U. S., 150;
*Magroun v. Ill., etc. Bank*, 170 U. S., 294;
*Nicol v. Ames*, 173 U. S., 521;
*Erb. v. Marasch*, 177 U. S., 586;
*W. W. Cargill Co. v. Minn.*, 180, U. S., 469;
*Cotting v. Kansas, etc., Co.* 183, U. S., 107;
*Connelly v. Union Pipe Co.*, 184 U. S., 561;
*Fidelity Ass'n. v. Mettler*, 185 U. S., 325.

The classification attempted by this statute is not based on the fact that the ownership of the vehicle is that of a railroad company; or that the service in which the vehicles were engaged at the time the injury was inflicted was the service of a railroad company, for the reason that the statute is so extended as to embrace any sort of car or engine moving on a track, owned by any corporation, or any person. It is not based on the fact that the vehicles involved were moved or operated by the dangerous agencies, either of electricity or steam, as clearly appears from the fact that it is extended even to cars that are operated by lever power; which means man power; which means a mere hand car; or even a tricycle operated by the occupant alone.

The whole classification, therefore, is one, not of the business in and about which the vehicle is engaged, not of the motive power by which the vehicle is propelled, but wholly is based on the fact that the vehicle moves on a track.

We submit that a classification based wholly on that consideration, as here, is not based on a reasonable ground, and there is no difference which bears any just or proper relation to the attempted classification made. The selection within the purview of constitutional principles, is one merely arbitrary.

To illustrate and enforce this position we shall instance a few cases of its manifest application.

The statute is so drawn as now to be applicable to the employes of a street railway company, because its cars move on tracks; but it is not applicable to the employes of a transfer company whose vehicles are propelled by electricity, and may be sixty horsepower taxicabs or omnibuses, or freight wagons, for no other reason than this, that they move on paved streets and not on tracks; in other words because this latter class of vehicles has a less circumscribed field of movement, and, therefore, is, in fact, all the more dangerous, it is excluded from the classification.

Again, the statute includes street railway cars; but it would wholly exclude an immense, very heavy, powerful and dangerous traction engine, even although that engine has been engaged, as is not uncommonly the case, in pulling a train containing more or less, in number, of dump cars, this latter train being excluded for the simple reason that it doesn't move on iron rails, but moves on highways. A man engaged in working about this train, and operating it, is not entitled to the protection of the statute, or its privileges. A man engaged about an ordinary street car is entitled. It is not a reasonable classification.

Again the statute includes protection to employes who are engaged on or about the simple appliance of a hand car, or even on or about so light a vehicle and one so entirely under the control of the operator, as a railroad tricycle; but his vehicle moves on a track, while, on the other hand, an employe engaged on and about the formidable and dangerous taxicab, traction engine,

even with its train of dump cars attached, are not protected by the statute.

But there are even more striking illustrations. Take, for instance, the case of a great public work going on, say, in the City of Jackson, Mississippi. Various parties have contracted with the builder to haul dirt, or brick, or stone. It so happens that the source of supply for one contractor is such that he can make an arrangement with the street railway, which happens to have tracks immediately contiguous to his place of excavation, or to his brick kiln for trackage rights, by which he has the privilege of hauling his floats over their track, drawing them by some small machine run by steam or electricity or gasoline.

The other contractor has floats of a similar character, but there is no contiguous street railway tracks, so that he has to haul his material on his floats, drawn over the paved street or road by a traction engine.

The liability would exist in the one case; it would not in the other, yet there is no essential difference in the character of the work. The only difference, in fact, that one set of floats runs on a line of rails, and the other one on the pavement.

Again, this statute, as shown above, extends a new rule to employes engaged on vehicles which are, in point of fact, not dangerous inherently, as is expressly held in the *Givens case*, cited above, but it denies the rule to those employes who are engaged in and about the most dangerous of all instrumentalities—that is to say, to those engaged about steamboats, steamships, airships, even the Zeppelins, simply for the reason that these evidently dangerous moving vehicles do not run on tracks.

It seems to us that the case is reducible to an absurdity. Take, for instance, the movement of a carload of lumber at Gulfport, Mississippi. The car has reached Gulfport, and has been side-tracked. Its railway trip is over. It needs to be loaded on ship-

board. A switch engine of the Gulf & Ship Island Railroad Company moves the car a half mile over the pier and spots it opposite an ocean-going steamer. That is the least dangerous portion of the whole operation, yet those employes who are engaged in that work receive the benefit of the statute. Those employes who received the lumber as spotted, handle it with cranes, work by steam power, transfer it from the railway car to the hold of the steamer, and do much the more dangerous part of the whole work, are not protected by the statute, they *not* moving over any track, and their steamer moving over none.

The Court will, therefore, see that this classification of which we complain, is not based on the ownership of the vehicle, as by a railroad company; nor is it based on the nature of the work in which the vehicle inflicting the injury may be engaged, nor on the dangerous character of such work; nor is it based on the ponderous, weighty, and comparatively uncontrollable character of the vehicles; nor is it based on the fact that vehicles are moved by any of the dangerous agencies, such as steam or electricity, but it is based only and exclusively on the fact that the vehicle runs on a track.

We, therefore, submit again, that such classification is not reasonable, but is arbitrary, and that it has no proper relation to the nature of the instrumentality about which it is made.

The Supreme Court of Mississippi, in their opinion in this case (see brief of defendant in error, page 57, bottom), says as follows:

> "The statute provides that the remedies extend to all employes using engines, locomotives or cars owned and operated by railroad corporations, and all other corporations and individuals. In short, the class made by the statute is all employes using such engines, locomotives and cars of all kinds and descriptions propelled by the dangerous agencies

specified and running on tracks, that is, in a defined way such as used by railroads. We deem this a reasonable classification which applies equally to all in the same situation."

This Court will observe that the Mississippi Court cites no precedent whatever for its decision. It says that "we deem this a reasonable classification," but it gives no reason whatever for so doing, and the conclusion is itself, we respectfully submit, quite unreasonable and within the condemnation of the rule relied on by us. The question is not reasoned out in anywise whatever. It is simply the *dixit* of the three gentlemen who happen to be on the State Bench.

It is true the State Supreme Court said this: "We deem this a reasonable classification, which applies equally to all in the same situation." If, by these expressions it is meant to indicate that the fact that a classification made applies equally to all in the same situation, justifies such classification of itself, we submit that this is erroneous. Nor did Justice McKenna, in the language quoted on page 58 of defendant's brief, from the case of *Aluminum Company v. Ramsey*, 222 U. S., 251, so mean. The expression used, and apparently relied on by the Mississippi Court, occurs not only in that case, but in others. Yet this Court has never decided that the mere fact of equality within the proposed class justifies the class, but, on the contrary, has repeatedly indicated otherwise.

The reason is obvious. It is a reason inherent in the nature of things; inherent in the very conception of classification. What is classification? It is, and necessarily it must be, a process at once of exclusion and of inclusion. The class must be composed of an aggregate of individuals, from the body of which all other individuals are excluded; also, the class must be composed of an aggregate of induviduals within which several or many are included. There could be no class otherwise. Therefore, within constitutional principle,

and to preserve that equality of the protection of the law about which this discussion arises, it necessarily is true that there must be equality within the class, as between the members of the class; otherwise, the Constitution is violated. But, also, it is true that within the same constitutional principle there must be some reasonable ground on which the class that is constituted can be separated from the general mass of mankind. So that the full and true statement of the doctrine is that, in order that a class shall be constitutionally made two things are necessary. First, the classification made must be placed on some reasonable relation existing between the making of the class, and the purposes for which it is made; and, secondly, those who are included within the class must be equally dealt with. It takes the double test to make the class good.

If this were not true—if it were all, sufficient that those who are within the class are equally dealt with—then what would be the constitutional objection to this sort of legislation? A tax law providing that blue-eyed people shall pay taxes on the basis of four mills, and all others on the basis of six mills? All the blue-eyed people would be equally dealt with, and all those who are not blue-eyed would also be equally dealt with. Would that be a good classification for taxation within Constitution principle? Most certainly not. But it meets the test suggested as being the sufficient test of good classification. The reason why it is not good, legally stated, is because it does not meet the other Constitutional requisite, that there must be some rational relation between the classification made, and the purpose for which it is made.

The Supreme Court of Mississippi seems to have entirely misapprehended the expressions used in various decisions of this Court, in which reference is had to the second requisite of equality within the class, and to have treated such equality as if it were the sole requisite, which, of course, is erroneous.

Respectfully submitted,

T. BRADY, JR.,

EDWARD MAYES,

*Attorneys for Plaintiffs in Error.*

Edward Mayes
Attorneys for Plaintiffs in Error

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## EASTERLING LUMBER COMPANY *v.* PIERCE.

### ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 589. Submitted November 30, 1914.—Decided December 14, 1914.

A classification based on the use of engines, locomotives and cars propelled by steam, electricity, gas, gasoline or lever power and running on tracks, in a state statute, abolishing the principle of negligence of fellow servant as a defense to actions against corporations and individuals for damages, is not so unequal as to deny equal protection of the law under the Fourteenth Amendment; and so *held* as to chap. 194, Laws of Mississippi of 1908.

A state statute which cuts off no substantive defense but simply provides a rule of evidence controlling the burden of proof, does not deny

due process of law even when applied in the trial of an action for injuries sustained prior to the enactment of the statute; and so *held* as to chap. 215, Laws of Mississippi of 1912, making proof of the happening of an accident a *prima facie* presumption of negligence.
61 So. Rep. 461, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of two statutes of Mississippi, one abolishing the defense of fellow servant in certain cases, and the other creating a presumption of negligence in certain cases, are stated in the opinion.

*Mr. Edward Mayes* and *Mr. T. Brady, Jr.*, for plaintiffs in error.

*Mr. Joseph Hirsh* and *Mr. E. L. Dent* for defendant in error.

Memorandum opinion by direction of the court, by MR. CHIEF JUSTICE WHITE.

The injuries for which damages were awarded by the judgment sought to be reviewed (64 So. Rep. 461) happened on a steam logging railroad engaged in purely domestic business. The power to here review is based on two constitutional grounds seasonably asserted below assailing two state statutes, the one (chap. 194, Miss. Laws of 1908, p. 204) enacted before the accident, doing away in the cases for which it provided with the principle of fellow servant; and the other (chap. 215, Miss. Laws of 1912, p. 290), enacted after the happening of the accident but before the trial below, providing that from the proof of the happening of an accident there should arise a *prima facie* presumption of negligence.

The constitutional objection to the first statute is that the classification for which it provided was so unequal as to cause the statute to be in conflict with the Fourteenth

Amendment. The classification was this: "Every employé of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, . . ." That the objection is without merit is so clearly established as to require only references to the decided cases to that effect.[1]

The objection to the second statute is that it was wanting in due process because retroactively applied to the case since the statute was enacted after the accident occurred. But the court below held that the statute cut off no substantive defense but simply provided a rule of evidence controlling the burden of proof. That as thus construed it does not violate the Fourteenth Amendment to the Constitution of the United States is also so conclusively settled as to again require nothing but a reference to the decided cases.[2]

As it results that at the time the writ of error was sued out it had been conclusively settled by the decisions of this court that both grounds relied upon were devoid of merit, we think the alleged constitutional questions were too frivolous to sustain jurisdiction and we therefore maintain the motion which has been made to dismiss and our judgment will be

*Dismissed for want of jurisdiction.*

[1] *Tullis* v. *Lake Erie & W. R. R.*, 175 U. S. 348; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *Louisville & Nashville R. R.* v. *Melton*, 218 U. S. 36; *Aluminum Company* v. *Ramsey*, 222 U. S. 251.

[2] *Mobile, J. & K. R. R.* v. *Turnipseed*, 219 U. S. 35, 42–43; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 82; *Reitler* v. *Harris*, 223 U. S. 437, 441–442; *Luria* v. *United States*, 231 U. S. 9, 25–27.

## LOVELL-McCONNELL MANUFACTURING COMPANY *v.* AUTOMOBILE SUPPLY MANUFACTURING COMPANY.

APPLICATION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 722. Motion for leave to file petition for writ of mandamus or certiorari, submitted November 16, 1914.—Decided December 14, 1914.

In this case a petition for mandamus directing the court below to correct its action is denied and a petition for certiorari granted, and the parties having so stipulated, the papers filed are treated as the record, and the case regarded as submitted for decision on the merits.

Although the provisions in the Act of February 13, 1911, c. 47, 36 Stat. 901, in regard to clerk's fee for supervising printing the record, may not apply to appeals from every interlocutory decree, it does apply where the decree, as in this case, although interlocutory in character, is, within the intendment of the statute, a final decree. *Smith* v. *Farbenfabriken of Elberfeld Co.*, 197 Fed. Rep. 894, approved.

THE facts, which involve the construction of the act of February 13, 1911, 36 Stat. 901, amending the fee bill and its application to interlocutory decrees, are stated in the opinion.

*Mr. Irving M. Obrieght* and *Mr. George C. Dean*, for Lovell-McConnell Co., in support of the motion.

*Mr. C. A. L. Massie* and *Mr. Ralph Lane Scott*, for Automobile Supply Co., in opposition to the motion:

The act of February 13, 1911, deals with a review by a Court of Appeals upon either "writ of error" or "appeal," as the case may be of "the final judgment or decree." The present controversy arises upon an appeal from an "interlocutory" decree, therefore the act does not here apply.

Amendment. The classification was this: "Every employé of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, . . ." That the objection is without merit is so clearly established as to require only references to the decided cases to that effect.[1]

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As it results that at the time the writ of error was sued out it had been conclusively settled by the decisions of this court that both grounds relied upon were devoid of merit, we think the alleged constitutional questions were too frivolous to sustain jurisdiction and we therefore maintain the motion which has been made to dismiss and our judgment will be

*Dismissed for want of jurisdiction.*

[1] *Tullis* v. *Lake Erie & W. R. R.*, 175 U. S. 348; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *Louisville & Nashville R. R.* v. *Mellon*, 218 U. S. 36; *Aluminum Company* v. *Ramsey*, 222 U. S. 251.

[2] *Mobile, J. & K. R. R.* v. *Turnipseed*, 219 U. S. 35, 42–43; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 82; *Reitler* v. *Harris*, 223 U. S. 437, 441–442; *Luria* v. *United States*, 231 U. S. 9, 25–27.